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Miglin *v.* Miglin, [2003] 1 S.C.R. 303, 2003 SCC 24

Eric Juri Miglin *Appellant*

v.

Linda Susan Miglin *Respondent*

Indexed as: Miglin *v.* Miglin

Neutral citation: 2003 SCC 24.

File No.: 28670.

2002: October 29; 2003: April 17.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for ontario

Family law — Divorce — Corollary relief — Spousal support — Separation agreement — Spousal support release clause — Spouses executing final separation agreement containing release of any future claims for spousal support — Wife subsequently applying for spousal support under s. 15 of Divorce Act — Appropriate threshold for judicial intervention in separation agreement on application for spousal support — Weight to be attributed to spousal support release clause in separation agreement — Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 15.2.

Trial — Fairness — Divorce — Corollary relief — Spousal support — Whether trial judge's comments and interventions raised reasonable apprehension of bias.

Five years after the parties were married in 1979, they purchased a lodge in northern Ontario as equal shareholders, and ran it together as a family business. The parties each drew a salary from the business of $80,500 per annum. They had four children and the family divided their time between the lodge and the matrimonial home in Toronto. In 1993, the parties separated when the children were between 2 and 7½ years of age. The wife was then 41 and the husband 43 years old. After more than a year of negotiations, they executed a separation agreement containing a full and final spousal support release clause. It was agreed that the children would reside primarily with the wife, and that the husband would pay $60,000 per annum for their support. He also agreed to pay the mortgage on the matrimonial home. Pursuant to the agreement, the husband transferred his one-half interest in the matrimonial home, valued at $250,000, to the wife, while the wife released her interest in the lodge, valued at $250,000, to the husband. In addition, the wife released any interest in his unvalued outfitting business. The parties also executed a consulting agreement between the wife and the lodge that provided her with an annual salary of $15,000 for a period of five years, renewable on the consent of the parties. After their divorce, relations between the parties became acrimonious. Approximately four years after the separation agreement and six months before the expiry of the consulting agreement, the wife applied for sole custody, child support and spousal support under s. 15 (now s. 15.2) of the *Divorce Act*. The trial judge awarded the wife spousal support in the amount of $4,400 per month for a period of five years. The Court of Appeal upheld the award of support and removed the five-year term.

Held (LeBel and Deschamps JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.: The narrow test enunciated in the *Pelech* trilogy for interfering with a pre-existing agreement is not appropriate in the current statutory context. Agreements concluded with the intent that they be final may, in limited circumstances, be overridden on grounds other than those defined in the trilogy, which established that a court was permitted to override a final agreement on spousal support only where there has been a radical and unforeseen change in circumstances that was causally connected to the marriage. Judicial and societal understandings of spousal support have changed since the release of *Pelech*, and recognize different models of support as appropriate in different circumstances. That the spousal support objectives in s. 15.2 often conflict suggests that Parliament intended to vest a significant discretion in trial judges to assess the weight to be given to each objective against the very particular backdrop of the parties' circumstances. The trilogy's singular emphasis on self-sufficiency and a clean break is too crude; some circumstances will call for compensatory support, as in *Moge*, or for non-compensatory support, as in *Bracklow*. Nevertheless, economic self-sufficiency is a legislative objective, and the Act as a whole advances the objectives of certainty, finality and negotiated settlements. On an initial application for support under s. 15.2, the concept of a change in circumstances has no relevance, except to the limited extent that there might have been a pre-existing order or agreement that must be considered. The 1985 Act militates in favour of a contextual assessment of all the circumstances, including the content of the agreement. The Court of Appeal erred in incorporating the material change test from s. 17 into s. 15.2. It is not the existence of change *per se* that matters but whether, at the time of the application, all the circumstances render continued reliance on the pre-existing agreement unacceptable.

An initial application for spousal support inconsistent with a pre-existing agreement requires a two-stage investigation into all the circumstances surrounding that agreement, first at the time of its formation, and second, at the time of the application. Unimpeachably negotiated agreements that represent the intentions and expectations of the parties and that substantially comply with the objectives of the *Divorce Act* as a whole should receive considerable weight. Holding that any agreement that deviates from the objectives listed in s. 15.2(6) would inevitably be given little or no weight would seriously undermine the significant policy goal of negotiated settlement and would undermine the parties' autonomy and freedom to structure their post-divorce lives in a manner that reflects their own objectives and concerns. It would also render the direction to consider prior agreements in s. 15.2(4)(*c*) meaningless. In searching for a proper balance between consensus and finality on the one hand, and sensitivity to the unique concerns that arise in the post-divorce context on the other, a court should be guided by the objectives of spousal support listed in the Act, but should also treat the parties' reasonable best efforts to meet those objectives as presumptively dispositive of the spousal support issue. The court should set aside the wishes of the parties as expressed in a pre-existing agreement only where that agreement fails to be in substantial compliance with the overall objectives of the Act, including certainty, finality and autonomy.

At the first stage, the court should look at the circumstances in which the agreement was negotiated and executed to determine whether there is any reason to discount it, including any circumstances of oppression, pressure or other vulnerabilities. Circumstances less than "unconscionability" in the commercial law context may be relevant, but a court should not presume an imbalance of power. Further, the degree of professional assistance received by the parties may be sufficient to overcome any systemic imbalances between the parties. Next, the court must consider the substance of the agreement to determine whether it is in substantial compliance with the Act. Assessment of an agreement's substantial compliance with the entire Act will necessarily permit a broader gamut of arrangements than would be the case if testing agreements narrowly against the support order objectives in s. 15.2(6). Moreover, a determination that an agreement fails to comply substantially with the Act does not necessarily mean that the entire agreement must be set aside. Even an agreement not fully enforceable may still indicate the parties' objectives and understanding of their marriage.

At the second stage, the court must assess whether the agreement still reflects the original intentions of the parties and the extent to which it is still in substantial compliance with the objectives of the Act. Accordingly, the party seeking to set aside the agreement will need to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned. Some degree of change in the circumstances of the parties is always foreseeable, as agreements are prospective in nature. Parties are presumed to be aware that health, job markets, parental responsibilities, housing markets, and values of assets are all subject to change. It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act, that the court may be persuaded to give the agreement little weight.

Here, the separation agreement should be accorded significant and determinative weight. At the time of its formation, nothing in the surrounding circumstances indicated that the negotiations or execution of the separation agreement were fraught with vulnerabilities. Both parties had engaged the services of expert counsel and negotiations persisted over a lengthy period. Likewise, nothing in the substance of the agreement demonstrated a significant departure from the overall objectives of the Act. The division of assets in the agreement reflected the parties' needs and wishes at the time and fairly distributed the assets acquired and created by them over the course of their marriage. Moreover, the quantum of child support was arrived at in full contemplation of the wife's spousal support release. The quantum of child support established in the agreement was intended to provide the wife with a minimum amount of income in contemplation of her not working. The change to the obligations regarding childcare did not take the wife's current position outside the reasonable range of circumstances that the parties contemplated in making the agreement. Finally, the consulting contract reflects the parties' intention to provide the wife with a source of employment income for a limited time. The nonrenewal of the contract did not render continued reliance on the original separation agreement inappropriate. The contract stipulated that renewal required the consent of both parties, and there is no evidence of any damaging long-term impact of the marriage on the wife's employability or that, at the time of negotiation, she underestimated how long it would take to become self-sufficient. In this sense, the facts in *Moge* are sharply distinguishable. The spousal support release must be assessed in the context of the financial arrangements that were made at the time the agreement was negotiated. Overall, these arrangements sought to redress any disadvantages arising from the marriage while facilitating a disentanglement of their economic lives and promoting finality, autonomy, and self-sufficiency. The wife's evidence regarding her circumstances at the time of her support application fails to demonstrate that the separation agreement fairly negotiated and substantially compliant with the objectives of the Act at its formation is no longer so and therefore should not continue to govern the parties' post-divorce obligations towards each other.

There is no reason to interfere with the Court of Appeal's conclusion that although the trial judge's comments were intemperate and his interventions at times impatient, they do not rise to the level necessary to establish a reasonable apprehension of bias.

Per LeBel and Deschamps JJ. (dissenting): In light of the 1985 amendments to the *Divorce Act* and the Court's recent jurisprudence, it is inappropriate to continue to apply the trilogy's approach. The 1985 *Divorce Act* created a fundamentally different statutory environment from the 1968 Act in two key aspects that are inconsistent with the trilogy: (1) the articulation in s. 15.2(6) of four specific spousal support objectives and (2) the inclusion of separation agreements in s. 15.2(4) as one of the factors relevant to the exercise of judicial discretion in an application for corollary relief. These provisions require courts to engage in a more nuanced analysis than that required under the 1968 Act, starting with the s. 15.2(6) spousal support objectives. The structure of s. 15.2(6) dictates that no single objective is paramount and that courts are required to apply all four of the objectives in an application for corollary relief under s. 15.2. The trilogy's requirement of a radical and unforeseen change in circumstances that is causally connected to the marriage is thus incompatible with the requirements of s. 15.2(6). More broadly, s. 15.2(6) significantly qualifies the role of one of the key philosophies underlying the trilogy's strict threshold: that parties should be required to achieve self-sufficiency quickly and permanently in order to facilitate a "clean break". While self-sufficiency is referenced in

s. 15.2(6), it is only one of four objectives. What flows naturally from the language of the 1985 Act is an approach that requires the court to evaluate the parties' agreement at the time of the application for corollary relief to see if it meets the objectives for spousal support enumerated in s. 15.2 (6). The support objectives, each of which is predicated on the philosophy of marriage as a socio-economic partnership, can be seen as an attempt to achieve an equitable sharing of the economic consequences of marriage or marriage breakdown. The degree to which the agreement realizes these objectives in light of all of the parties' circumstances at the time of the application will be the determining factor in according it "finality". *Moge* and *Bracklow* both espouse a contextual approach to spousal support that is fundamentally inconsistent with the emphasis on absolute autonomy, formal equality, and deemed self-sufficiency that grounded the trilogy's privileging of finality, even at the expense of fairness.

Separation and support agreements are made in a unique context and aim to disentangle complex relationships and interdependencies. They are often negotiated in situations that are emotionally charged. They are also inherently prospective in nature and the parties may have difficulty accurately forecasting how the economic consequences of their marriage and its breakdown will play out over time. In cases of marriage breakdown, it is not appropriate to require that circumstances rise to the level of unconscionability before parties' agreements will be reopened. Separation agreements are formed in environments where the assumptions underpinning the enforceability of freely chosen bargains do not apply to the same extent as in the commercial context. It is typically women who come to the bargaining table as the financially dependent spouse, and hence the more vulnerable party in the negotiating process. The unconscionability test is blind to the subtle ways in which the economic disparities between the parties and the parties' respective familial roles, both of which continue to be gender-based, may play into the negotiating process and significantly influence its outcome. Excessive deference to separation agreements because they are presumed to represent the objective expression of the parties' free will is an undesirable policy. Even the presence of counsel may not be sufficient to redress the problems.

The appropriate threshold for overriding a support agreement in an application for corollary relief under s. 15.2, based on the language of the statute, is whether the agreement is objectively fair at the time of the application. This gives a court a broad jurisdiction and a duty to ensure that matrimonial agreements prove to be consistent with the objectives of the law. It also allows the reviewing court to intervene regardless of whether the unfairness at the time of the application stems from the unfairness of the initial agreement; the parties' failure at the time the agreement was negotiated to accurately predict how the economic consequences of the marriage or its breakdown would play out over time; or changes in the parties' circumstances. It places the emphasis on whether the support agreement has in fact brought about an equitable distribution of the economic consequences of the marriage and its breakdown. With its emphasis on an objective evaluation of the content of the agreement and the circumstances of the parties at the time of the application, this approach is also appropriately responsive to the unique nature of family law agreements. Finally, the objective fairness approach reflects Parliament's driving consideration with respect to support awards: achieving an equitable disentangling of the parties' economic relationship upon marital breakdown. It is inappropriate to allow parties, by way of private agreements, to subvert this statutory policy, and to require courts to sanction this subversion by mandating deference to unfair agreements.

A fair agreement is one that reasonably realizes the objectives codified in s. 15.2(6). The process of determining whether an agreement is fair will of necessity be fact and context specific. This will require trial judges to make case-by-case determinations based on the whole picture of the parties' relationship. Because parties may attempt to achieve economic equity in a variety of ways, the entirety of the parties' financial arrangement upon marital dissolution and not merely the spousal support provisions in their agreement must be considered. For an agreement to merit deference in an application for corollary relief under s. 15.2, it must recognize the parties' lived reality and must genuinely attempt in light of this reality to equitably apportion the economic consequences flowing from the marriage and its breakdown. Provided that at the time of the application the arrangement falls within the generous ambit within which reasonable disagreement is possible in terms of realizing the objectives in s. 15.2(6), it will be enforced. Where an agreement fails to address the dependent spouse's proven need arising from the breakdown of the marriage, however, it is appropriate for the court to intervene on the ground that the agreement is inconsistent with the objectives in s. 15.2(6), even if the agreement achieves some of the parties' other goals in reaching a settlement.

While s. 9(2) recognizes that settlement is to be encouraged, it cannot be read independently from the very specific spousal support objectives outlined in s. 15.2(6). The legislated policy goal is the negotiation of fair settlements, with fairness evaluated according to the objectives of the 1985 Act. An objective fairness threshold for judicial intervention in spousal support agreements will allow parties considerable freedom to draft an agreement that accords with the s. 15.2(6) objectives and reflects their own preferences, fostering the genuine autonomy and dignity of both spouses. The awareness that reviewing courts will evaluate agreements in terms of the degree to which they realize the objectives in s. 15.2(6) should lead parties to prioritize reaching an equitable distribution of the economic consequences of the marriage and its breakdown. The inquiry into whether an agreement is objectively fair at the time of the application involves a probing, contextual analysis of the content of the agreement and the circumstances of the parties at the time of the application in order to determine whether the substantive effect of the agreement is an equitable distribution of the economic consequences of the marriage and its breakdown. The express wording of the 1985 Act and judicial developments since *Pelech* mandate that such agreements aspire to, and in fact achieve, substantive justice.

Here, it is clear the objectives of s. 15.2(6) were not met. The parties recognized the wife's need for an income stream by the existence of the consulting contract and the fact that her need might continue beyond the contract's five-year term; but in providing her with only $15,000 per annum, the contract failed to address the significant financial deficit created by the loss of her position with the lodge. The resulting inequity was compounded when the husband failed to renew the consulting agreement, despite the fact that the wife was experiencing ongoing need arising in part from the childcare responsibilities that the parties had agreed she would assume both during and after the marriage. In losing her share in the parties' successful business and her employment, the wife disproportionately suffered the economic disadvantages of marriage breakdown.

The wife also suffered disproportionate economic disadvantages arising from the roles that the parties adopted during their marriage, both in their business relationship and in their domestic lives. Because her employment since 1984 had been exclusively with the lodge, she did not leave the marriage

with any of the advantages that typically would have flowed from long-term employment outside of the family business, such as seniority or job security. Rather, the limited opportunities that she had to develop marketable skills in the family business will have a long-term impact on her prospects for self-sufficiency. Further, as the primary caregiver the wife's day-to-day childcare responsibilities will continue to have significant, long-term economic consequences for her, limiting both her opportunities for employment and her future earning capacity, thus impairing her capacity to become economically self-sufficient. The parties' financial arrangements were not appropriately attentive to the objective in s. 15.2(6)(*b*) of apportioning between the spouses the financial consequences arising from the care of the parties' children, over and above any obligation for the support of the children of the marriage. The wife will have no income stream, other than the support that she receives for her children, for the foreseeable future unless she sells her home or divests herself of her RRSPs. Considered as a whole, then, the parties' financial arrangements were insufficient to fall within the generous ambit within which reasonable disagreement is possible in terms of realizing the spousal support objectives in s. 15.2(6) at the time of the wife's application. It was thus appropriate for the trial judge to intervene and award her corollary relief. While the wife has a responsibility to take steps towards achieving self-sufficiency, this must be understood in light of the fact that she is raising young children on a full-time basis. As the children grow older, her responsibility for finding employment may well increase, and the court retains the jurisdiction to intervene if it becomes clear that she is not making a serious effort to move towards self-sufficiency.

As found by the majority, there is no reason to interfere with the Court of Appeal's conclusion that the trial judge's comments do not rise to the level necessary to establish a reasonable apprehension of bias.

Cases Cited

By Bastarache and Arbour JJ.

Applied: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; **distinguished:** *Pelech v. Pelech*, [1987] 1 S.C.R. 801; *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Caron v. Caron*, [1987] 1 S.C.R. 892; **considered:** *Moge v. Moge*, [1992] 3 S.C.R. 813; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420; *Leopold v. Leopold* (2000), 12 R.F.L. (5th) 118; *Boston v. Boston*, [2001] 2 S.C.R. 413, 2001 SCC 43; **referred to:** *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627; *Corkum v. Corkum* (1988), 14 R.F.L. (3d) 275; *G. (L.) v. B. (G.)*, [1995] 3 S.C.R. 370; *Willick v. Willick*, [1994] 3 S.C.R. 670; *Santosuosso v. Santosuosso* (1997), 32 O.R. (3d) 143.

By LeBel J. (dissenting)

Pelech v. Pelech, [1987] 1 S.C.R. 801; *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Caron v. Caron*, [1987] 1 S.C.R. 892; *Willick v. Willick*, [1994] 3 S.C.R. 670; *Moge v. Moge*, [1992] 3 S.C.R. 813; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420; *G. (L.) v. B. (G.)*, [1995] 3 S.C.R. 370; *Messier v. Delage*, [1983] 2 S.C.R. 401; *Santosuosso v. Santosuosso* (1997), 32 O.R. (3d) 143; *Wilkinson v. Wilkinson* (1998), 43 R.F.L. (4th) 258; *Droit de la famille — 1404*, [1991] R.J.Q. 1561; *Droit de la famille — 1567*, [1992] R.J.Q. 931; *Droit de la famille — 1688*, [1992] R.J.Q. 2797; *Droit de la famille — 2249*, [1995] R.J.Q. 2066; *Droit de la famille — 2325*, [1996] R.J.Q. 34; *Droit de la famille — 2537*, [1996] R.D.F. 735; *D.V. v. J.A.F.*, [2002] R.J.Q. 1309; *Leopold v. Leopold* (2000), 12 R.F.L. (5th) 118; *Corkum v. Corkum* (1988), 14 R.F.L. (3d) 275; *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83; *Mundinger v. Mundinger* (1968), 3 D.L.R. (3d) 338, aff'd (1970), 14 D.L.R. (3d) 256n; *Champagne v. Champagne*, [2001] O.J. No. 2660 (QL).

Statutes and Regulations Cited

Civil Code of Québec, S.Q. 1991, c. 64, arts. 414 *et seq.*

Divorce Act, R.S.C. 1970, c. D-8, s. 11.

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [am. 1997, c. 1], ss. 9(2), 15.2(1) [formerly s. 15(2)], 15.2(4) [formerly s. 15(5)], 15.2(6) [formerly s. 15(7)], 17, 17(1), 17(4.1) [formerly s. 17(4)], 17(7).

Family Law Act, R.S.O. 1990, c. F.3, ss. 5, 33(4).

Family Relations Act, R.S.B.C. 1996, c. 128, s. 65(1).

Federal Child Support Guidelines, SOR/97-175, ss. 15 to 20.

Authors Cited

Bailey, Martha J. "*Pelech, Caron*, and *Richardson*" (1989-90), 3 *C.J.W.L.* 615.

Bala, Nicholas. "Domestic Contracts in Ontario and the Supreme Court Trilogy: 'A Deal is a Deal'" (1988), 13 *Queen's L.J.* 1.

Bala, Nicholas, and Kirsten Chapman. "Separation Agreements & Contract Law: From the Trilogy to *Miglin*", in *Child & Spousal Support Revisited*, tab 1. Toronto: Law Society of Upper Canada, 2002.

Belley, Jean-Guy. *Le contrat entre droit, économie et société: Étude sociojuridique des achats d'Alcan au Saguenay-Lac-Saint-Jean*. Cowansville, Qué.: Yvon Blais, 1998.

Durnford, John W., and Stephen J. Toope. "Spousal Support in Family Law and Alimony in the Law of Taxation" (1994), 42 *Can. Tax J.* 1.

Friedman, Lawrence M. *American Law in the 20th Century*. New Haven: Yale University Press, 2002.

Goubau, Dominique. "La situation depuis la trilogie *Pelech*", dans *Droit de la famille québécois*, vol. 2. Farnham, Qué.: Publications CCH/FM, 1985 (feuilles mobiles mises à jour 2001).

Goubau, Dominique. "Une nouvelle ère pour la pension alimentaire entre ex-conjoints au Canada" (1993), 72 *Can. Bar Rev.* 279.

Grant, Stephen M. "The End of Finality" (1997), 27 R.F.L. (4th) 252.

Law Society of Upper Canada. *Rules of Professional Conduct* (effective November 1, 2000), rules 2.02 (2), (3).

Martin, Craig. "Unequal Shadows: Negotiation Theory and Spousal Support Under Canadian Divorce Law" (1998), 56 *U.T. Fac. L. Rev.* 135.

McLachlin, Beverley. "Spousal Support: Is it Fair to Apply New-Style Rules to Old-Style Marriages?" (1990), 9 *Can. J. Fam. L.* 131.

McLeod, James G. Annotation to *B. (G.) v. G. (L.)* (1995), 15 R.F.L. (4th) 216.

McLeod, James G. Annotation to *Leopold v. Leopold* (2000), 12 R.F.L. (5th) 120.

Menear, Mike. "*Miglin v. Miglin* — Judicial Assault on Individual Liberty" (2002), 20 *C.F.L.Q.* 119.

Neave, Marcia. "Resolving the Dilemma of Difference: A Critique of 'The Role of Private Ordering in Family Law'" (1994), 44 *U.T.L.J.* 97.

Payne, Julien D., and Marilyn A. Payne. *Canadian Family Law*. Toronto: Irwin Law, 2001.

Payne, Julien D., and Marilyn A. Payne. *Dealing with Family Law: A Canadian Guide*. Toronto: McGraw-Hill Ryerson, 1993.

Shaffer, Martha, and Carol Rogerson. "Contracting Spousal Support: Thinking Through *Miglin*" (2003), 21 *C.F.L.Q.* 49.

Shaffer, Martha, and Daniel S. Melamed. "Separation Agreements Post-*Moge*, *Willick* and *L.G.* v. *G.B.*: A New Trilogy?" (1999), 16 *Can. J. Fam. L.* 51.

Stotland, Gerald, and Margo R. Siminovitch. "Renunciation to Spousal Support — The Great Escape" (1996-97), 14 *C.F.L.Q.* 159.

Young, Alison Harvison. "The Changing Family, Rights Discourse and the Supreme Court of

Canada" (2001), 80 *Can. Bar Rev.* 749.

APPEAL from a judgment of the Ontario Court of Appeal (2001), 53 O.R. (3d) 641, 198 D.L.R. (4th) 385, 16 R.F.L. (5th) 185, 144 O.A.C. 155, [2001] O.J. No. 1510 (QL), affirming a decision of the Superior Court of Justice (1999), 3 R.F.L. (5th) 106, [1999] O.J. No. 5011 (QL). Appeal allowed, LeBel and Deschamps JJ. dissenting.

Nicole Tellier and *Kelly D. Jordan*, for the appellant.

Philip M. Epstein, Q.C., *Aaron M. Franks* and *Ilana I. Zylberman*, for the respondent.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ. was delivered by

BASTARACHE AND ARBOUR JJ. —

I. Introduction

1 This appeal concerns the proper approach to determining an application for spousal support pursuant to s. 15.2(1) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) ("1985 Act"), where the spouses have executed a final agreement that addresses all matters respecting their separation, including a release of any future claim for spousal support. Accordingly, this appeal presents the Court with an opportunity to address directly the question of the continued application of the *Pelech* trilogy (*Pelech v. Pelech*, [1987] 1 S.C.R. 801; *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Caron v. Caron*, [1987] 1 S.C.R. 892) in light of the significant legislative and jurisprudential changes that have taken place since its facts arose and since its release.

2 In broader terms, the appeal raises the question of the proper weight to be given to any type of spousal support agreement that one of the parties subsequently wishes to have modified through an initial application in court for such support. In that sense, the matter is not restricted to spousal support agreements that contain a time-limited support arrangement or to agreements which contain a full and final release from support obligations by one or both parties.

3 The parties to this appeal, now divorced, entered into a final agreement that sought to settle all of their financial and personal affairs surrounding the breakdown of their marriage. In addition to property equalization, custody, access and support of their children, and a commercial contract between the respondent and the appellant's company, the parties agreed to release one another from any claims to spousal support. This Court must determine the proper weight to be accorded that agreement where one party subsequently makes an application for spousal support under the *Divorce Act*.

4 As we explain below, we believe that a fairly negotiated agreement that represents the intentions and expectations of the parties and that complies substantially with the objectives of the *Divorce Act* as a whole should receive considerable weight. In an originating application for spousal support, where the parties have executed a pre-existing agreement, the court should look first to the circumstances of negotiation and execution to determine whether the applicant has established a reason to discount the agreement. The court would inquire whether one party was vulnerable and the other party took advantage of that vulnerability. The court also examines whether the substance of the agreement, at formation, complied substantially with the general objectives of the Act. As we elaborate later, these general objectives include not only an equitable sharing of the consequences of the marriage breakdown under s. 15.2, but also certainty, finality and autonomy. Second, the court would ask whether, viewed from the time the application is made, the applicant has established that the agreement no longer reflects the original intention of the parties and whether the agreement is still in substantial compliance with the objectives of the Act. In contrast, the trial judge's and the Court of Appeal's approaches failed to value a determination by the parties as to what is mutually acceptable to them. We would thus allow this appeal.

5 The appellant also asks this Court to determine whether the comments and interventions of the trial judge give rise to a reasonable apprehension of bias. We will deal with these two major issues in reverse order.

II. Background

6 Linda and Eric Miglin separated in 1993 after 14 years of marriage. At the time of separation, they were 41 and 43 years old respectively and had four children aged 2 to 7½ years.

7 Not surprisingly, the gloss with which the parties paint their marriage and their accounts of the roles and responsibilities assumed by each of them differ. Mr. Miglin claims that theirs was a modern marriage where both spouses were also equal business partners, with Ms. Miglin advancing her career and education during the marriage. Ms. Miglin characterizes the marriage as "traditional", with

Mr. Miglin managing the family's finances, making the financial decisions and giving her money when she needed it, while she was responsible for raising the children and "helping out" with the family business. Although the characterizations differ, the basic facts are not in dispute.

8 The couple met while both were employed at the Toronto Dominion Bank. Ms. Miglin was employed in an administrative capacity. Mr. Miglin was employed as a management trainee, having recently completed his Master's degree in Business Administration at Harvard University. Mr. Miglin left the Bank to operate concession stores in Algonquin Park. Ms. Miglin accepted his invitation to come help with the concessions and left her employment with the Bank to join him. They married a year later, in 1979. By 1983, Ms. Miglin had completed a Bachelor of Arts degree from the University of Toronto.

9 In 1984 the couple purchased the Killarney Lodge resort in northern Ontario. Mr. and Ms. Miglin were equal shareholders in the business Killarney Lodge Limited (the "Lodge"). Mr. Miglin was responsible for the financial and business aspects of the Lodge. Ms. Miglin was responsible for its day-to-day operations. Ms. Miglin characterizes this division of labour as mirroring the traditional roles each assumed in the marriage. The trial judge found that Ms. Miglin was an "effective and important component in the hotel business", and was equally responsible for its success. At the time of separation, Mr. and Ms. Miglin each received a salary of $80,500 from the net profits of the Lodge. These salaries represented roughly one half of the declared earnings of the business.

10 During the marriage and before the children reached school age, the parties lived and worked at the Lodge from May to October. They hired a babysitter to look after the children while they worked. During the off-season months of November to April, the Miglins lived in Toronto. Once some of the children reached school age, Ms. Miglin commuted back and forth between Killarney and Toronto to accommodate the children's schedules. Ms. Miglin was the children's primary caregiver.

11 The parties separated in 1993. They both retained independent legal counsel and began the difficult process of negotiating a comprehensive separation agreement. Counsel were actively involved, and it is clear from their correspondence that both counsel were well informed of the latest developments in the law. After negotiating for 15 months, the parties executed a Separation Agreement dated June 1, 1994. Attached as Schedules to the Separation Agreement are a Parenting Plan and a Consulting Agreement between Ms. Miglin and the Lodge.

12 The Separation Agreement was intended, in its own words, "to settle, by agreement, all rights, claims, demands and causes of action that each has or may have against the other including, but not limited to claims of every nature with respect to property and support". The Separation Agreement runs to 32 pages and includes 41 numbered headings. The Separation Agreement addressed, among other things, Mr. Miglin's and Ms. Miglin's living arrangements, custody, child support, medical and dental coverage, personal property, the Lodge, another corporation owned by Mr. Miglin, debts, variation and non-compliance. The Separation Agreement is a sophisticated legal document and

contains, for example, explicit provisions contingent on the outcome in the appeal to this Court respecting tax treatment of child support in *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627.

13 The Separation Agreement included a full and final release of any future spousal support claims. The release reads as follows:

> 10. **RELEASE OF SPOUSAL SUPPORT**
>
> a. The Husband and the Wife each agree that neither shall be obliged to make any payment or payments in the nature of support, or any similar payment, whether periodic or by way of lump sum, directly or indirectly, to or for the benefit of the other. Without restricting the generality of the foregoing, the Husband and the Wife further agree that neither of them shall maintain, commence or prosecute or cause to be maintained, commenced or prosecuted any action against the other of them for support or interim support pursuant to the Family Law Act, the Succession Law Reform Act or any comparable Provincial legislation in force from time to time, or the Divorce Act, or any successor or similar legislation whereby a spouse or former spouse is given a cause of action against his or her spouse or the spouse's estate for relief in the nature of support.
>
> b. The Wife specifically abandons any claims she has or may have against the Husband for her own support. The Wife acknowledges that the implications of not claiming support in this Agreement have been explained to her by her solicitor. At no time now or in the future, including any future divorce proceedings, or upon the Husband's death shall the Wife seek support for herself, regardless of the circumstances.
>
> c. The Husband specifically abandons any claims he has or may have against the Wife for his own support. The Husband acknowledges that the implications of not claiming support in this Agreement have been explained to him by his solicitor. At no time now or in the future, including any future divorce proceedings, or upon the Wife's death shall the Husband seek support for himself, regardless of the circumstances.
>
> d. The parties are aware that this is a final Agreement and intended to be a final break between them. No further claims will be made against either party by the other arising from the marriage or upon the dissolution thereof, including any claims under Section 15 of the Divorce Act or upon the death of one of them. Both parties are aware of the possibilities of fluctuation in their respective incomes and assets, are cognizant of the possible increases and decreases in the cost of living and are aware that radical, material, profound or catastrophic changes may affect either of them. Each party is prepared to accept the terms of this Agreement as a full and final settlement and waive all further claims against the other,

except a claim to enforce the terms of this Agreement or for dissolution of their marriage. The parties specifically agree and acknowledge that there is no causal connection between the present or any future economic need of either party and their marriage. No pattern of economic dependency has been established in their marriage.

e. The parties agree that the divorce judgment shall be silent as to spousal support.

14 The Separation Agreement appears exhaustive in its attempts to disentangle the economic affairs of Mr. Miglin and Ms. Miglin. Besides the full and final release of any spousal support, the Separation Agreement also includes a pension plan release and release of estates.

15 The Parenting Plan provided that the parents would share responsibility for the children, but that the primary residence of the four children was to be with Ms. Miglin. By the time of the trial, the eldest child was residing with Mr. Miglin.

16 When Mr. Miglin and Ms. Miglin separated, both the Lodge and the matrimonial home had net values of approximately $500,000. The Separation Agreement provided that Ms. Miglin would transfer to Mr. Miglin her one-half interest in the Lodge in exchange for the transfer to her of his one-half interest in the matrimonial home. Mr. Miglin agreed to assume sole responsibility for the mortgage on the matrimonial home. The Separation Agreement also provided that Ms. Miglin would receive child support in the amount of $1,250 per child, per month, for an annual total of approximately $60,000, taxable in her hands and tax-deductible to Mr. Miglin, subject to an annual cost of living increase.

17 The Consulting Agreement, executed between the Lodge and Ms. Miglin, provided Ms. Miglin with an annual salary of $15,000, subject to a cost of living increase. The Consulting Agreement required Ms. Miglin to perform services detailed in the contract, including maintenance of the mailing list, preparation of an annual newsletter, advertising and promotion, and attendance at trade shows. The contract was for a term of five years with an option to renew on the consent of both parties.

18 The parties' Divorce Judgment was granted effective January 23, 1997. It was silent with respect to spousal support, child support, and child custody and access arrangements.

19 After entering into the Separation Agreement, the parties were able to maintain an amicable relationship and an *ad hoc* parenting arrangement developed. Consequently, the parties did not

adhere rigidly to the access arrangements set out in the Parenting Plan. The parties' relationship deteriorated in 1997, however, when Ms. Miglin underwent a religious conversion and sold the matrimonial home in Toronto to move to Thornhill, Ontario. Ms. Miglin eventually sought and received an order preventing Mr. Miglin from attending at the children's school. This order was later rescinded, but attests to the degree of animosity that arose between the parties. It is in the midst of this turmoil that in June 1998 Ms. Miglin brought an application for sole custody, child support and spousal support.

III. Relevant Statutory Provisions

20 *Divorce Act*, R.S.C. 1970, c. D-8, s. 11

11. (1) Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:

(*a*) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of

(i) the wife . . .

(*b*) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of

(i) the husband . . .

(2) An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them.

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), as amended

9. . . .

(2) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters.

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

. . .

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

(*a*) the length of time the spouses cohabited;

(*b*) the functions performed by each spouse during cohabitation; and

(*c*) any order, agreement or arrangement relating to support of either spouse.

. . .

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

(*a*) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(*b*) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(*c*) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(*d*) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(*a*) a support order or any provision thereof on application by either or both former spouses;

. . .

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

. . .

(7) A variation order varying a spousal support order should

(*a*) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;

(*b*) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(*c*) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and

(*d*) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

IV. Judicial History

A. *Ontario Superior Court of Justice* (1999), 3 R.F.L. (5th) 106

21 Tobias J. held that under an application for corollary relief under s. 15 of the 1985 Act, the court is only required to determine whether the Separation Agreement is consistent with the social policies and objectives set out in s. 15(7) (now s. 15.2(6)). He rejected the argument that the court is required to determine a threshold issue relating to a change of circumstances. Tobias J. found that the Separation Agreement treated Ms. Miglin unfairly and commented that he considered the Consulting Agreement to be "thinly veiled spousal support" orchestrated to provide a tax advantage for Mr. Miglin. Based on his finding that Mr. Miglin had an annual income of $200,000, Tobias J. awarded Ms. Miglin spousal support in the amount of $4,400 per month for a term of five years. He ordered Mr. Miglin to pay monthly child support in the amount of $3,000, based on the *Federal Child Support Guidelines*, SOR/97-175, ss. 15-20, amount applicable for his income, for the remaining three children residing primarily with Ms. Miglin.

B. *Ontario Court of Appeal* (2001), 53 O.R. (3d) 641

22 Abella J.A., for the court, held that in light of the new language of the 1985 Act (as compared to the *Divorce Act*, R.S.C. 1970, c. D-8 ("1968 Act")) and the revised approach to spousal support developed by this Court, the *Pelech* trilogy no longer applied. She adopted a two-stage inquiry for the variation of a subsisting support agreement in an application for corollary relief under s. 15.2. The first, threshold stage is to determine whether there has been a material change in circumstances. This change need not be causally connected to the marriage. Once the material change threshold is met, the second stage requires the court to determine the amount of spousal support justified (under the statutory principles set out in s. 15 of the 1985 Act and subsequent Supreme Court jurisprudence).

23 Applying her analysis to the facts of this case, she held that the material change threshold was met through a combination of two factors: Ms. Miglin's child-care responsibilities had increased as compared to what was initially anticipated and the Consulting Agreement was terminated. Abella J.A. agreed with Tobias J. that the Consulting Agreement was "thinly disguised" spousal support. Abella J.A. upheld the trial judge's quantum of spousal support but removed the five-year term. The amount of child support was adjusted based on a concession by Ms. Miglin that Mr. Miglin's income was $186,130 annually. This resulted in a reduction in the monthly amount of child support for the three children from $3,000 to $2,767.

24 Abella J.A. rejected Mr. Miglin's argument that the trial judge's comments and interventions had raised a reasonable apprehension of bias.

V. Analysis

A. *Reasonable Apprehension of Bias*

25 Mr. Miglin urged this Court to order a new trial on the basis that the interventions by the trial judge throughout the proceedings, by reason of their frequency, timing, content and tone, gave the trial an unmistakable appearance of unfairness.

26 The appropriate test for reasonable apprehension of bias is well established. The test, as cited by Abella J.A., is whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable apprehension of bias: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 111, *per*

Cory J.; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at pp. 394-95, *per* de Grandpré J. A finding of real or perceived bias requires more than the allegation. The onus rests with the person who is alleging its existence (*S. (R.D.)*, at para. 114). As stated by Abella J.A., the assessment is difficult and requires a careful and thorough examination of the proceeding. The record must be considered in its entirety to determine the cumulative effect of any transgressions or improprieties. We see no reason to interfere with the Court of Appeal's assessment of the record, nor with its conclusion that although the trial judge's comments were intemperate and his interventions at times impatient, they do not rise to the level necessary to establish a reasonable apprehension of bias.

27 We wish to stress, however, how critical it is for trial judges to maintain at all times an appearance of impartiality and fairness when presiding over acrimonious matrimonial disputes. Trying as the conduct of the parties may be, trial judges must be alive to the emotionally charged nature of the proceedings. Parties to litigation of this kind may feel particularly vulnerable and sensitive. Trial judges should measure the wisdom of their interventions accordingly.

B. *Spousal Support*

28 As mentioned earlier in these reasons, this appeal is concerned with the continued application of the *Pelech* trilogy. The three cases making up this trilogy were decided immediately after the promulgation of the 1985 Act, but dealt with situations governed by the 1968 Act. Those cases establish a change-based test under which a court is permitted to override a final agreement on spousal support only where there has been a significant change in circumstances since the making of the agreement. The test establishes a threshold that is defined as a radical and unforeseen change that is causally connected to the marriage. It does not deal with the fairness of the agreement or its attention to the objectives of the *Divorce Act*. It is designed to promote certainty and to facilitate a clean break in the relationship of the parties, focussing on individual autonomy and respect for contracts. Since the release of the trilogy, the law of spousal support has evolved. A compensatory approach was adopted in *Moge v. Moge*, [1992] 3 S.C.R. 813. A more nuanced approach was developed in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420. Self-sufficiency, autonomy and finality remain relevant factors in our case law, but many question whether the emphasis put on them by the trilogy remains. The question posed is whether agreements concluded with the intent that they be final can, under the 1985 Act, be overridden on grounds other than those defined in the trilogy.

1. Does the *Pelech* Trilogy Still Apply?

29 The issues in the present appeal resemble those facing this Court in the *Pelech* trilogy. Despite significant changes in the intervening years, the basic question remains: What role should a pre-existing agreement play in determining an application for spousal support? Writing for the majority of

this Court in *Pelech*, Wilson J. described the issue the following way, at p. 832:

> While it is generally accepted that the existence of an antecedent settlement agreement made by the parties is an important fact, there is a wide range of views as to how this affects the legal principles governing the exercise of the discretion conferred in s. 11 [of the 1968 Act].

30 Except for the statutory reference, these words could easily have been written by us today. The statutory and jurisprudential context, however, is of utmost importance. As counsel for both parties recognized, the resolution of this appeal rests primarily on an exercise in statutory interpretation. The revision of the *Divorce Act* in 1985 and changing judicial and societal understandings of the function of spousal support make it appropriate for this Court to revisit Parliament's intention regarding agreements relating to spousal support.

31 The facts and reasoning of the three cases constituting the trilogy have attracted substantial scholarly and judicial commentary. We do not propose to review those decisions in detail again here. Suffice it to say that the *Pelech* trilogy has come to stand for the proposition that a court will not interfere with a pre-existing agreement that attempts fully and finally to settle the matter of spousal support as between the parties unless the applicant can establish that there has been a radical and unforeseen change in circumstances that is causally connected to the marriage. The trilogy represents an approach to spousal support that has been described as a "clean break," emphasising finality and the severing of ties between former spouses. As Wilson J. put it in *Pelech*, at p. 851:

> [I]t seems to me that parties who have declared their relationship at an end should be taken at their word. They made the decision to marry and they made the decision to terminate their marriage. Their decisions should be respected. They should thereafter be free to make new lives for themselves without an ongoing contingent liability for future misfortunes which may befall the other.

32 With the coming into force of the 1985 Act and the release of the trilogy the following year, confusion ensued as to whether the trilogy had any continued application. The confusion may stem from two main factors. On the one hand, the 1968 Act, while providing less direction on the issue of support, could be interpreted as not inconsistent with the new, more detailed statute. Indeed, Professor M. Bailey has suggested that the trilogy was more consistent with the new Act because the latter explicitly provides that agreements are to be a factor in determining support and because the support objectives outlined in s. 15.2(4) reflect the trilogy's emphasis on self-sufficiency and the necessity of linking need to the marriage or its breakdown. ("*Pelech*, *Caron*, and *Richardson*" (1989-90), 3 *C.J.W.L.* 615, at p. 624).

33 On the other hand, some members of the judiciary and several scholars recognized the potential difficulties in applying the *Pelech* trilogy in the new statutory context. As Misener L.J.S.C. stated in *Corkum v. Corkum* (1988), 14 R.F.L. (3d) 275 (Ont. H.C.), at p. 286:

> I am obliged to say that I have the greatest difficulty in my own mind reconciling the direction that Parliament has given the courts in s. 15(5) [now s. 15.2(4)] and (7) [now s. 15.2(6)], in exercising its discretion to order spousal maintenance and to fix the amount and duration of it, with the application of the principle set forth in *Richardson*. Section 15(5) specifically directs the court to consider the provisions of a separation agreement as only *one* of three factors included in the phrase "other circumstances". How then can the agreement be made the only factor to be considered in all but the most exceptional circumstances? Section 15(7) directs the court to fix the amount of and the duration of support with a view to accomplishing certain specified objectives. The almost automatic adoption of the terms of a separation agreement will in many cases — and indeed in this case — at least tend to defeat one or more of these objectives. One would think that any order that would tend to have such a result would not be permissible in the proper exercise of the court's discretion. [Underlining added; italics in original.]

34 In addition to generating some confusion, the trilogy received no small degree of criticism, from both legal scholars and family law practitioners. The main thrust of the criticism levied at the trilogy was summarized by McLachlin J. (as she then was) in a speech delivered to the National Family Law Program over a decade ago. McLachlin J. suggested that the "joint venture model" of marriage, which viewed married persons as autonomous individuals entering into equal partnerships who should and do take responsibility for themselves, informed the economic self-sufficiency or "clean break" theory of spousal support endorsed by this Court in *Pelech*. Although McLachlin J. fully endorsed the model of equality on which the trilogy was based, she cautioned that that model did not necessarily conform to everyone's reality. This disjuncture, in her view, explained much of the criticism to which the trilogy has been subjected (the Honourable Madame Justice B. McLachlin, "Spousal Support: Is it Fair to Apply New-Style Rules to Old-Style Marriages?" (1990), 9 *Can. J. Fam. L.* 131).

35 Since the trilogy, decisions from this Court have recognized a shift in the normative standards informing spousal support orders. In *Moge*, *supra*, at p. 849 L'Heureux-Dubé J. held for the majority that the underlying theme of the 1985 Act is the "fair and equitable distribution of resources to alleviate the economic consequences of marriage or marriage breakdown". In making an order for support, she noted that the court must have regard to all four of the objectives of spousal support, none of which is paramount. Self-sufficiency is only one of those objectives and an attenuated one at that (to be promoted "insofar as practicable" (p. 852)). L'Heureux-Dubé J. concluded that Parliament appears to have adopted a compensatory model of support, one which attempts to ensure the equitable sharing of the economic consequences of marriage and its breakdown.

36 Regarding the trilogy specifically, L'Heureux-Dubé J. held that it had no application to the circumstances of that case, where there had been no final agreement between the parties. In her view, the trilogy did not address issues of entitlement to support in the absence of an agreement. Nevertheless, her reasoning with respect to the "compensatory model" of support only served to fuel debate as to whether the *Pelech* trilogy still governed at all. See e.g. A. H. Young, "The Changing Family, Rights Discourse and the Supreme Court of Canada" (2001), 80 *Can. Bar Rev.* 749, at pp. 781-82.

37 This Court's decision in *G. (L.) v. B. (G.)*, [1995] 3 S.C.R. 370, further illustrated the questions relating to the trilogy's continued relevance. Sopinka J., writing for a four-member majority, held that the facts did not require the Court to address directly the continued validity of the trilogy. *G. (L.)* involved an application for variation to a consent support order, under s. 17 of the *Divorce Act*, arising out of a pre-existing agreement between the parties. The parties had agreed to an amount of spousal support and to certain conditions for reducing or eliminating entitlement. Sopinka J. held that the trial judge applied the correct test of material change, enunciated by this Court in *Willick v. Willick*, [1994] 3 S.C.R. 670. He further held that there was no basis to interfere with the trial judge's findings of fact and, accordingly, that the threshold of material change had not been met. He noted, finally, that the Court of Appeal had erred in applying a presumption of self-sufficiency to the recipient wife and, accordingly, in granting the husband's application for a reduction in the quantum of his support obligation.

38 In contrast, L'Heureux-Dubé J., writing for a three-member minority, addressed the trilogy directly. She concluded that it is no longer good law. In language cited and relied on extensively by Abella J.A. in the present appeal, L'Heureux-Dubé J. explained that the new 1985 Act adopted "as its underlying philosophy a partnership in marriage and, at the time of a divorce, an equitable division of its economic consequences between the spouses" (*G. (L.)*, at para. 41). She drew on this Court's approach to spousal support under the 1985 Act, as laid out in *Moge*, *supra*. She noted in particular that the presence of a separation agreement is only one factor, albeit an important one, that a court must consider in making an initial order for support. In her view, the *Divorce Act* accords this factor no greater weight than any other, making the trilogy — and its emphasis on self-sufficiency to the exclusion of other objectives — incompatible with the new Act.

39 Whereas the 1968 Act refers only to the "conduct of the parties and the condition, means, and other circumstances of each of them" (s. 11(1)), the 1985 Act abandons the reference to the conduct of the parties and makes explicit both the objectives of spousal support and the factors to be considered in making an order. That these objectives can and do often conflict and compete suggests an intention on the part of Parliament to vest in trial judges a significant discretion to assess the weight to be given each objective against the very particular backdrop of the parties' circumstances. Moreover, we agree that the importance given to self-sufficiency and a "clean break" in the jurisprudence relying on the trilogy is not only incompatible with the new Act, but too often fails to accord with the realities faced by many divorcing couples. Indeed, in *Bracklow*, *supra*, this Court recognized how these different realities also

mirror competing normative standards justifying entitlement to spousal support. McLachlin J. noted for the unanimous Court as follows, at para. 32:

> Both the mutual obligation model and the independent, clean-break model [of spousal support] represent important realities and address significant policy concerns and social values. The federal and provincial legislatures, through their respective statutes, have acknowledged both models. Neither theory alone is capable of achieving a just law of spousal support. The importance of the policy objectives served by both models is beyond dispute.

40 In light of these developments in the understanding of spousal support, the question "Does the trilogy apply or not?" is perhaps too mechanical, and the answer does not turn solely on the existence of a new Act. Parliament's recognition of competing objectives of spousal support renders the trilogy's privileging of "clean break" principles inappropriate, but this is not to suggest that the policy concerns that drove the trilogy are wholly irrelevant to the new legislative context. On the contrary, the objectives of autonomy and finality, as well as the recognition that the parties may go on to undertake new family obligations, continue to inform the current *Divorce Act* and remain significant today. What has changed is the singular emphasis on self-sufficiency as a policy goal to the virtual exclusion of other objectives that may or may not be equally pressing according to the specific circumstances of the parties. Such an emphasis on self-sufficiency is inconsistent with both the compensatory model of support developed in *Moge*, and the non-compensatory model of support developed in *Bracklow*. It is also inconsistent with the interpretive point made in both cases that no single objective in s. 15.2(6) is paramount: *Bracklow*, at para. 35; *Moge*, at p. 852. Nevertheless, promoting self-sufficiency remains an explicit legislative objective.

41 In addition to these competing policy goals, we also note that the current statutory language does not support direct incorporation of the trilogy test. In *Pelech*, Wilson J. held that an application for variation of spousal support required the applicant to demonstrate a radical and unforeseen change of circumstances causally related to the marriage, pursuant to s. 11(2). In *Richardson*, *supra*, she further held at p. 867 that the same test applied to initial applications for support where a pre-existing agreement that dealt finally with support was present:

> In my view, the only difference under the two subsections is that in a s. 11(1) application the change being considered will have occurred between the signing of the agreement and the application for the decree *nisi* whereas in the s. 11(2) application the change will have occurred between the granting of the decree *nisi* and the application for variation.

42 The current statutory context, however, is quite different in that Parliament has explicitly

directed the court to consider a change in circumstances only where the application is for variation to an existing spousal support order. Section 17(4.1) of the 1985 Act provides as follows:

> **17.** . . .
>
> (4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

43 Section 15.2 provides no such similar direction. Rather, the court is explicitly directed to take into account certain non-exhaustive factors, and instructed that a support order should advance certain specified objectives. On a plain reading of the statute, then, there is simply no basis for importing a change threshold, radical, material or otherwise, into the provision. Indeed, on an initial application for support, the very concept of "change of circumstances" has no relevance, except to the limited extent that there might have been a pre-existing order or agreement that needs to be considered.

44 How, then, should trial judges exercise the discretion vested in them by virtue of the Act where a party who makes an initial application for support has previously entered into an agreement that purports to have settled all matters between the spouses? How should trial judges assess the appropriate weight to be given such an agreement where s. 15.2 of the 1985 Act appears to accord it no greater priority than other factors?

45 It is helpful initially to identify several inappropriate approaches. In our view, the answer to these questions does not lie in adopting a near-impermeable standard such that a court will endorse any agreement, regardless of the inequities it reveals. Neither, however, does the solution lie in unduly interfering with agreements freely entered into and on which the parties reasonably expected to rely. It is also not helpful to read between the lines in s. 15.2 so as to identify a single implicit overriding legislative objective overshadowing the factors specifically set out. The fact that judicial and societal understandings of spousal support have changed since the release of *Pelech* and the adoption of admittedly competing factors in s. 15.2(6) does not lead to an unfettered discretion on the part of trial judges to substitute their own view of what is required for what the parties considered mutually acceptable. In this respect, we agree in principle with Wilson J.'s comments in *Pelech*, *supra*, at p. 853:

> Where parties, instead of resorting to litigation, have acted in a mature and responsible

> fashion to settle their financial affairs in a final way and their settlement is not vulnerable to attack on any other basis, it should not, in my view, be undermined by courts concluding with the benefit of hindsight that they should have done it differently.

46 Nevertheless, the language and purpose of the 1985 Act militate in favour of a contextual assessment of all the circumstances. This includes the content of the agreement, in order to determine the proper weight it should be accorded in a s. 15.2 application. In exercising their discretion, trial judges must balance Parliament's objective of equitable sharing of the consequences of marriage and its breakdown with the parties' freedom to arrange their affairs as they see fit. Accordingly, a court should be loathe to interfere with a pre-existing agreement unless it is convinced that the agreement does not comply substantially with the overall objectives of the *Divorce Act*. This is particularly so when the pre-existing spousal support agreement is part of a comprehensive settlement of all issues related to the termination of the marriage. Since the issues, as well as their settlement, are likely interrelated, the support part of the agreement would at times be difficult to modify without putting into question the entire arrangement.

47 Having determined that the narrow test enunciated in the *Pelech* trilogy for interfering with a pre-existing agreement is not appropriate in the current statutory context, we now consider the approaches taken by the courts below in this appeal.

2. Did the Trial Judge Err in Applying a "Fairness" Test?

48 The trial judge was correct in finding that the presence of a duly executed pre-existing agreement between the parties did not oust the jurisdiction of the court to make an order for spousal support. He was also correct in proceeding under s. 15.2 (then s. 15) of the Act and not incorporating the "material change" requirement of s. 17 into Ms. Miglin's application for an initial order. Finally, he was correct in finding that the trilogy's threshold test of a radical change of circumstances, recently articulated and applied in *Santosuosso v. Santosuosso* (1997), 32 O.R. (3d) 143 (Div. Ct.), was not appropriately viewed as governing s. 15 of the 1985 Act. Tobias J. found, at para. 24, that under s. 15 of the Act "the court is provided with authority to scrutinize a separation agreement without any requirement to find radical unforeseen changes".

49 With the threshold requirement removed, Tobias J. went on to consider the scope of the court's discretion to scrutinize the pre-existing agreement. He reasoned as follows at para. 28:

> Section 15(5)(c) [now s. 15.2(4)(c)] provides the court with the authority to scrutinize the separation agreement and to decide whether its provisions conform to the policies

> enunciated in Section15(7) [now s. 15.2(6)]. If the separation agreement fails to provide for either spouse in a fashion consistent with these objectives, it is the obligation of this court to undertake a review under Section 15(5) [now s. 15.2(4)] of the conditions, means, needs, and other circumstances of each spouse, and any child of the marriage including the length of time the spouses cohabited, the functions performed by the spouses during cohabitation, and, as well, any order, agreement, or arrangement relating to the support of the spouse or child.

50 Applying the above test, Tobias J. found, at para. 27, that the Separation Agreement suffered from "a fundamental inequality of matrimonial asset distribution" because

> it provides for the transfer of the one-half interest of the applicant in the hotel corporation for the sum of $250,000.00 and proposes to replace her annual salary of $80,200.00 with the consultation contract which provided $15,000.00 per annum. . . . The separation agreement provides that the Respondent convey to the applicant his one-half interest of $250,000.00 in the matrimonial home, a non-producing income asset, for the one-half-interest of the applicant in the hotel corporation having the same value. . . .

Accordingly, Tobias J. disregarded the spousal support waiver and, following his application of the spousal support objectives to the facts of this case, set spousal support at $4,400 per month for five years.

51 It is settled that Parliament has vested in courts the discretion to review and reject the terms of a pre-existing agreement: *Pelech*, at p. 827. Nevertheless, this discretion should not be exercised lightly. A purported inequality in asset distribution is not necessarily a sufficient basis to disregard the parties' declared intention to be bound by the terms of the agreement they reached. In fact, here there was no such inequality, as properly admitted by counsel for the respondent during the hearing of this appeal. Further, we do not accept that the weight to be afforded a pre-existing agreement should be determined solely by the extent to which that agreement is consistent with the specific objectives of spousal support orders listed in s. 15.2(6) of the Act. Such an interpretation is not consistent with the language and objectives of the *Divorce Act* more generally.

52 The objectives listed in s. 15.2(6) are designed to guide trial judges in determining the quantum, if any, and duration of a spousal support award made in an order of the court. Such an order is made either in the absence of an agreement between the parties or in substitution for some unacceptable terms in a proposed agreement submitted to the court for approval. In our view, these objectives are not intended to dictate by themselves the precise terms of an enforceable negotiated agreement dealing with spousal support, distribution of assets and child support. In the first place, the language of s. 15.2(6) is

suggestive only:

> **15.2** . . .
>
> (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should . . . [Emphasis added.]

Compare this provision with the mandatory language adopted in s. 15.2(4), which expressly directs the court to take certain factors into account in exercising its discretion to make an award:

> **15.2** . . .
>
> (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including . . . [Emphasis added.]

Nothing in these provisions indicates a duty on the court to subject a comprehensive agreement to scrutiny based solely on the objectives in s. 15.2(6) or to assume that any agreement by the parties will be enforceable only when its provisions substantially mirror what a trial judge, unfamiliar with the parties' motivations and subjective understanding of their relationship, would have awarded on the basis of these criteria alone.

53 The objectives in s. 15.2(6) do not accommodate within them the compelling objectives of finality, certainty and autonomy that Parliament has also seen fit to endorse in the *Divorce Act*. It should not be overlooked that s. 9(2) of the Act imposes a positive duty on counsel to advise clients of alternatives to litigation:

> **9.** . . .
>
> (2) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of

negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters.

54 Section 9(2) of the 1985 Act clearly indicates Parliament's intention to promote negotiated settlement of all matters corollary to a divorce. This, coupled with the suggestive language of s. 15.2(6) and the mandatory language of s. 15.2(4), suggests that more must be shown than mere deviation from what a trial judge would have awarded in an order before it is appropriate for the court to disregard the parties' pre-existing agreement. Without some degree of certainty that the agreement will be respected by the court, parties have little incentive to negotiate a settlement and then to comply with the terms of their undertakings. The policy goal underlying s. 9(2) would then be entirely defeated.

55 Furthermore, exclusive focus on the s. 15.2(6) objectives leaves no room for the parties to apply their own values and pursue their own objectives in reaching a settlement. The objectives in s. 15.2(6) may not sufficiently account for the many ways in which couples structure their marital relationship and face its dissolution. To impose on all separating or divorcing persons an obligation to adhere strictly and exclusively to the statutory spousal support objectives denies them the autonomy to organize their lives as they see fit and to pursue their own sense of what is mutually acceptable in their individual circumstances. Accordingly, the spousal support objectives should not operate so as to preclude parties from bringing their own concerns, desires and objectives to the table in negotiating what they view as a mutually acceptable agreement, an agreement they consider to comply substantially with the objectives of the Act. In that way, the policy goals of autonomy and certainty will be rendered consistent with Parliament's recognition of "the diverse dynamics of the many unique marital relationships" (*Bracklow*, *supra*, at para. 35).

56 This is not to suggest that courts should prioritize the policy goal of autonomy to the exclusion of all other concerns. Nor are we suggesting that courts should condone agreements that manifestly prejudice one party. The trial judge would endorse a seemingly unlimited discretion to disregard pre-existing agreements and impose his own view of what, in light of the spousal support objectives, constitutes equitable sharing of the consequences of the marriage breakdown. In contrast, we are of the view that what constitutes equitable sharing in this sense cannot be informed solely by the list of objectives set out in s. 15.2(6) of the Act. Unlike child support, for which relatively clear normative standards have been set, spousal support rests on no similar social consensus. See M. Shaffer and C. Rogerson, "Contracting Spousal Support: Thinking Through *Miglin*" (2003), 21 *C.F.L.Q.* 49 (paper originally presented to the National Family Law Program, in Kelowna, B.C., July 14-18, 2002), at p. 61. We note too that Parliament's adoption of broad, and at times competing, objectives for spousal support contrasts with its promulgation of uniform Child Support Guidelines. The discretion granted to trial judges respecting spousal support also contrasts with the detailed default provision for equalization of matrimonial property set out in s. 5 of the *Family Law Act*, R.S.O. 1990, c. F.3, and the obligatory regime of the family patrimony in arts. 414 *et seq.* of the *Civil Code of Québec*, S.Q. 1991, c. 64. Therefore, what is "fair" will depend not only on the objective circumstances of the parties, but also on how those parties conceive of themselves, their marriage and its dissolution, as well as their expectations and aspirations for the future.

57 We are of the view that, rather than trying to measure whether the terms of a comprehensive agreement advance the objectives of support set out in s. 15.2(6), trial judges must consider the agreement more broadly in light of all the objectives of the *Divorce Act*. These objectives of the Act as a whole, as compared with the objectives set out in s. 15.2(6), include the compelling policy goals of certainty, autonomy and finality. These legislative objectives require the trial judge to consider the extent to which the agreement represents a final settlement of the issues, negotiated under unimpeachable conditions, to which both parties agreed and on which each of them intended to rely. It is only then that the judge will consider whether the agreement must nevertheless be set aside in full or in part because it is not in substantial compliance with the broader objectives of the Act.

58 Accordingly, we cannot accept the trial judge's approach to assessing the appropriate weight to be given the pre-existing agreement.

3. Did the Court of Appeal Err in Applying a "Material Change" Test?

59 Abella J.A. began by agreeing with the trial judge that the application was properly brought under s. 15 of the *Divorce Act*, as an initial application for corollary relief. Regarding the applicability of the *Pelech* trilogy to the present statute, Abella J.A. held that she would not conclude that this Court had based its decision on a different statute from the one on which it expressly stated it was relying. Following a review of the jurisprudence and scholarly literature since the trilogy, she reasoned at para. 60:

> In my view, based on the new language in the 1985 *Divorce Act*, and the revised approach to support developed by the Supreme Court of Canada in accordance with those statutory changes, it is difficult to justify the continued application of the trilogy which emanated from a completely different statutory scheme. The language in s. 15 of the 1985 *Divorce Act* is so dramatic a departure from the linguistic and conceptual minimalism of s. 11 of the former *Divorce Act* that statutory interpretations emanating from the old legislation, such as the trilogy, cannot, it seems to me, continue to apply.

Abella J.A. commented further at para. 65, that in the *Divorce Act*:

> Agreements are not, notably, given any primacy, nor is there any explicit statutory direction for how the existence of an agreement is to be factored into an assessment of whether or how much support should be awarded.

60 We agree with Abella J.A. that the inclusion of "any order, agreement or arrangement" in s. 15.2(4)(*c*) suggests an intention on the part of Parliament to provide parties with a certain degree of confidence that these prior determinations, whether in the form of an order pursuant to a provincial statute, a formalized separation agreement, or some other arrangement between the parties, will not be easily disturbed. We further agree with Abella J.A. that there is no reason for subjecting a pre-existing agreement to a different or higher threshold than that for an agreement incorporated into an order. As she notes, where the parties properly consider a court order approving their agreement for support to be presumptively binding, it is difficult conceptually to see why a separation agreement that the parties view as no less binding should be subjected to a different threshold. A different threshold might provide an inappropriate incentive militating either for or against judicial approval of agreements.

61 We disagree, however, with Abella J.A.'s importation of the "material change" test developed for s. 17 of the Act (see *Willick*, *supra*) into s. 15.2 in respect of pre-existing agreements. As we noted earlier, the statutory language simply does not support this. Whereas s. 17 of the Act directs the court to satisfy itself that a change has occurred, s. 15.2 respecting initial support applications does not. Rather, s. 15.2(4) requires the court to consider the length of cohabitation, the roles of the parties during the marriage, and any orders, agreements or arrangements. This explicit direction cannot be avoided, cast, as it is, in mandatory language.

62 As we shall explain below, consistency between treatment of consensual agreements incorporated into orders and those that are not is achieved another way. It is achieved when judges making variation orders under s. 17 limit themselves to making the appropriate variation, but do not weigh all the factors to make a fresh order unrelated to the existing one, unless the circumstances require the rescission, rather than a mere variation of the order.

63 As we shall discuss more fully, however, changes to the parties' circumstances after completion of a separation agreement are obviously not wholly irrelevant considerations in assessing the weight to be given to a pre-existing agreement at the time of the application. In our view, the court should focus not on change as a threshold matter, leading to the total setting aside of an agreement, but rather on the totality of the circumstances, of which a change in the parties' circumstances will likely be an element. Put another way, it is not the existence of change *per se* that matters but whether, at the time of the application, all the circumstances render continued reliance on the pre-existing agreement unacceptable.

4. The Proper Approach to Applications Under Section 15.2

64 An initial application for spousal support inconsistent with a pre-existing agreement requires an investigation into all the circumstances surrounding that agreement, first, at the time of its formation, and second, at the time of the application. In our view, this two-stage analysis provides the court with a principled way of balancing the competing objectives underlying the *Divorce Act* and of locating the potentially problematic aspects of spousal support arrangements in their appropriate temporal context. Before doing so, however, it is necessary to discuss some of the interpretive difficulties affecting spousal support.

65 As a starting point, we endorse the reasoning of this Court in *Moge*, *supra*, where L'Heureux-Dubé J. held that the spousal support objectives of the *Divorce Act* are designed to achieve an equitable sharing of the economic consequences of marriage and marriage breakdown. By explicitly directing the court to consider the objectives listed in s. 15.2(6), the 1985 Act departs significantly from the exclusive "means and needs" approach of the former statute. We note, however, that there is a potential tension between recognizing any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown and promoting, even if only to the extent practicable, the economic self-sufficiency of each spouse (ss. 15.2(6)(*a*) and 15.2(6)(*d*)). The way to reconcile these competing objectives is to recognize that the meaning of the term "equitable sharing" is not fixed in the Act and will, rather, vary according to the facts of a particular marriage. Parliament, aware of the many ways in which parties structure a marriage and particularly its economic aspects, drafted legislation broad enough that one cannot say that the spousal support provisions have a narrow fixed content. Contrasted with the former Act, then, these objectives expressly direct the court to consider different criteria on which to base entitlement to spousal support, while retaining the objective of fostering the parties' ability to get on with their lives.

66 The role that these objectives was intended to play, however, must be understood in the proper statutory context. Whether by way of an initial application or an application to vary, the criteria listed in s. 15.2(6) and s. 17(7) pertain to spousal support orders imposed by the court. Nowhere in the *Divorce Act* is it expressed that parties must adhere strictly, or at all, to these objectives in reaching a mutually acceptable agreement. Rather, the listed objectives relate only to orders for spousal support, that is, to circumstances where the parties have been unable to reach an agreement. Moreover, the positive obligation that the Act places on counsel to advise their clients of alternatives to litigation, noted above, indicates Parliament's clear conception of the new divorce regime as one that places a high premium on private settlement. Parliament's preference appears to be that parties settle their dispute, without asking a court to apply s. 15.2(6) to make an order. This is not to suggest that the objectives are irrelevant in the context of a negotiated agreement. The parties, or at least their counsel, will be conscious of the likely outcome of litigation in the event that negotiation fails. Consideration of the statutory entitlements will undoubtedly influence negotiations. But the mutually acceptable agreement negotiated by the parties will not necessarily mirror the spousal support that a judge would have awarded. Holding that any agreement that deviates from the objectives listed in s. 15.2(6) be given little or no weight would seriously undermine the significant policy goal of negotiated settlement. It would also undermine the parties' autonomy and freedom to structure their post-divorce lives in a manner that reflects their own objectives and concerns. Such a position would leave little room to recognize the terms that the parties determined were mutually acceptable to them and in substantial compliance with the objectives of the *Divorce Act*.

67 Having said this, we are of the view that there is nevertheless a significant public interest in ensuring that the goal of negotiated settlements not be pursued, through judicial approbation of agreements, with such a vengeance that individual autonomy becomes a straitjacket. Therefore, assessment of the appropriate weight to be accorded a pre-existing agreement requires a balancing of the parties' interest in determining their own affairs with an appreciation of the peculiar aspects of separation agreements generally and spousal support in particular.

68 Each of the parties in this appeal has suggested a model for the exercise of judicial discretion in the context of a s. 15.2 application. The appellant submits that the proper test for determining the weight due a pre-existing agreement mirrors that adopted by several provincial legislatures in statutes dealing with spousal support. In Ontario, for example, the *Family Law Act* confers on the court a discretion to set aside a domestic contract in certain circumstances. Concerning the court's exercise of its supervisory discretion, s. 33(4) provides as follows:

> **33.** . . .
>
> (4) The court may set aside a provision for support or a waiver of the right to support in a domestic contract or paternity agreement and may determine and order support in an application under subsection (1) although the contract or agreement contains an express provision excluding the application of this section,
>
> (a) if the provision for support or the waiver of the right to support results in unconscionable circumstances [in French: *situation inadmissible*]; [Emphasis added.]

69 Counsel for the appellant urges this Court to adopt a similar test of "unconscionable circumstances". She suggests that these provisions are directed to relieve unconscionable circumstances at the time of the support application, rather than to offer relief from an agreement that was unconscionable at the time of signing. In the appellant's view, the latter situation can be remedied in accordance with the general law of contract.

70 The appellant's counsel further submits that the "unconscionable circumstances" test gives sufficient weight to the binding nature of domestic contracts while being flexible enough to redress gross inequities. Moreover, she argues that it avoids the difficulties that arise where both the sufficiency and the foreseeability of "change" form part of the test. Finally, she submits that, because it already appears in several provincial regimes, such a test has the added benefit of offering a degree of

uniformity to an important area of law.

71 In contrast, counsel for the respondent proposes a more searching standard of review. He proposes the following test, at para. 123 of his factum:

> On an originating application for spousal support, where spousal support has been released or a time limited support arrangement has ended, examining a prior agreement as a whole, and having regard to the factors and objectives of a spousal support order listed in section 15.2 of the *Divorce Act*, a court should award reasonable spousal support to a claimant spouse where:
>
> > (a) the spousal support provisions of the previous agreement did not reasonably reflect the factors and objectives of section 15.2 of the *Act* at the time the agreement was executed or, in other words, where the spousal support provisions in the previous agreement were not within the generous ambit within which reasonable disagreement is possible; or
> >
> > (b) the provisions of the agreement have resulted in unfair circumstances such that the agreement does not meet the factors and objectives of the *Divorce Act* as anticipated.

72 We note, in passing, that neither of the proposals put forth by the parties resembles the tests adopted in the courts below. Indeed, counsel for both parties have provided this Court with able submissions on the unworkability of both the trial judge's loosely crafted "fairness" test and the Court of Appeal's "material change" test. We also note that the differences between the proposals put forth by the parties are subtle. Each reflects an attempt to balance the competing objectives at work in the *Divorce Act*. The difference lies in how that balance is ultimately struck.

73 In our view, there is merit to each of these positions. Nevertheless, we believe that the approach that will provide both negotiating spouses and, failing agreement, courts with a principled and consistent framework is not that proposed by either party. The test should ultimately recognize the particular ways in which separation agreements generally and spousal support arrangements specifically are vulnerable to a risk of inequitable sharing at the time of negotiation and in the future. At the same time, the test must not undermine the parties' right to decide for themselves what constitutes for them, in the circumstances of their marriage, mutually acceptable equitable sharing. Our approach, for example, takes greater account of the parties' subjective sense of equitable sharing than the objective "unconscionable circumstances" standard proposed by counsel for the appellant.

74 Negotiations in the family law context of separation or divorce are conducted in a unique environment. Both academics and practitioners have acknowledged that this is a time of intense personal and emotional turmoil, in which one or both of the parties may be particularly vulnerable. Unlike emotionally neutral economic actors negotiating in the commercial context, divorcing couples inevitably bring to the table a host of emotions and concerns that do not obviously accord with the making of rational economic decisions. As Payne and Payne note:

> In the typical divorce scenario, spouses negotiate a settlement, often with the aid of lawyers, at a time when they are still experiencing the emotional trauma of marriage breakdown. Spouses who have not come to terms with the death of their marriage and who feel guilty, depressed or angry in consequence of the marriage breakdown are ill-equipped to form decisions of a permanent and legally binding nature.

(J. D. Payne and M. A. Payne, *Dealing with Family Law: A Canadian Guide* (1993), at p. 78. See also *Leopold v. Leopold* (2000), 12 R.F.L. (5th) 118 (Ont. S.C.))

75 Add to this mix the intimate nature of the marital relationship that makes it difficult to overcome potential power imbalances and modes of influence. As Wilson J. notes in *Leopold*, at para. 128:

> [F]or parties negotiating a separation agreement, one party may have power and dominance financially, or may possess power through influence over the children. Our courts have also recognized the need to curtail one spouse's power over the other. The reality . . . is that often both contracting parties are vulnerable emotionally, with their judgment and ability to plan diminished, without the other spouse preying upon or influencing the other. The complex marital relationship is full of potential power imbalance. In a sense, vulnerability is implicit in the difficult emotional process of separation.

76 We also note that, depending on the circumstances of the parties, a wide array of interrelated elements may make up a global separation agreement. Such a separation agreement may comprise division or equalization of marital property, provision for custody and support of any children, as well as provisions for spousal support, be it in the form of lump sum, periodic payment, time-limited payment or a waiver and release. These matters, with the exception of the property division, are

primarily prospective in nature, although compensatory spousal support is retrospective. As Shaffer and Rogerson point out, *supra*, at pp. 68-69:

> At the point separation agreements are being negotiated it is difficult to know what post-divorce life will be like and how it will unfold. . . .
>
> [The] economic advantages and disadvantages are often difficult to predict in advance; rather the full impact of the marriage and its breakdown is something that only becomes apparent over time. In our view one of the main problems with contracting spousal support is that spouses routinely underestimate the time it will take a formerly dependent spouse to overcome the economic disadvantages of the marriage and become self-sufficient. But foreseeability problems can also affect payors who may experience unexpected decreases in their income.

77 In our view, Parliament's recognition of the potential complications in the process of contracting spousal support is reflected in the *Divorce Act* itself. We see this in the direction to the court to consider an agreement as only one factor among others, rather than to treat it as binding, subject merely to remedies in contract law. Accordingly, contract law principles are not only better suited to the commercial context, but it is implicit in s. 15 of the 1985 Act that they were not intended to govern the applicability of private contractual arrangements for spousal support.

78 Therefore, in searching for a proper balance between consensus and finality on the one hand, and sensitivity to the unique concerns that arise in the post-divorce context on the other, a court should be guided by the objectives of spousal support listed in the Act. In doing so, however, the court should treat the parties' reasonable best efforts to meet those objectives as presumptively dispositive of the spousal support issue. The court should set aside the wishes of the parties as expressed in a pre-existing agreement only where the applicant shows that the agreement fails to be in substantial compliance with the overall objectives of the Act. These include not only those apparent in s. 15.2 but also, as noted above, certainty, finality and autonomy.

79 With these broad concerns in mind, we now turn to the specifics of the two-stage approach to the exercise of the court's discretion.

(a) *Stage One*

80 In an originating application for spousal support, where the parties have executed a pre-existing agreement, the court should first look to the circumstances in which the agreement was negotiated and executed to determine whether there is any reason to discount it.

(i) The Circumstances of Execution

81 It is difficult to provide a definitive list of factors to consider in assessing the circumstances of negotiation and execution of an agreement. We simply state that the court should be alive to the conditions of the parties, including whether there were any circumstances of oppression, pressure, or other vulnerabilities, taking into account all of the circumstances, including those set out in s. 15.2(4)(*a*) and (*b*) and the conditions under which the negotiations were held, such as their duration and whether there was professional assistance.

82 We pause here to note three important points. First, we are not suggesting that courts must necessarily look for "unconscionability" as it is understood in the common law of contract. There is a danger in borrowing terminology rooted in other branches of the law and transposing it into what all agree is a unique legal context. There may be persuasive evidence brought before the court that one party took advantage of the vulnerability of the other party in separation or divorce negotiations that would fall short of evidence of the power imbalance necessary to demonstrate unconscionability in a commercial context between, say, a consumer and a large financial institution. Next, the court should not presume an imbalance of power in the relationship or a vulnerability on the part of one party, nor should it presume that the apparently stronger party took advantage of any vulnerability on the part of the other. Rather, there must be evidence to warrant the court's finding that the agreement should not stand on the basis of a fundamental flaw in the negotiation process. Recognition of the emotional stress of separation or divorce should not be taken as giving rise to a presumption that parties in such circumstances are incapable of assenting to a binding agreement. If separating or divorcing parties were generally incapable of making agreements it would be fair to enforce, it would be difficult to see why Parliament included "agreement or arrangement" in s. 15.2(4)(*c*). Finally, we stress that the mere presence of vulnerabilities will not, in and of itself, justify the court's intervention. The degree of professional assistance received by the parties will often overcome any systemic imbalances between the parties.

83 Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions. Accordingly, the court should be loathe to interfere. In contrast, where the power imbalance did vitiate the bargaining process, the agreement should not be read as expressing the parties' notion of equitable sharing in their circumstances and the agreement will merit little weight.

(ii) The Substance of the Agreement

84 Where the court is satisfied that the conditions under which the agreement was negotiated are satisfactory, it must then turn its attention to the substance of the agreement. The court must determine the extent to which the agreement takes into account the factors and objectives listed in the Act, thereby reflecting an equitable sharing of the economic consequences of marriage and its breakdown. Only a significant departure from the general objectives of the Act will warrant the court's intervention on the basis that there is not substantial compliance with the Act. The court must not view spousal support arrangements in a vacuum, however; it must look at the agreement or arrangement in its totality, bearing in mind that all aspects of the agreement are inextricably linked and that the parties have a large discretion in establishing priorities and goals for themselves.

85 When examining the substance of the agreement, the court should ask itself whether the agreement is in substantial compliance with the *Divorce Act*. As just noted, this "substantial compliance" should be determined by considering whether the agreement represents a significant departure from the general objectives of the Act, which necessarily include, as well as the spousal support considerations in s. 15.2, finality, certainty, and the invitation in the Act for parties to determine their own affairs. The greater the vulnerabilities present at the time of formation, the more searching the court's review at this stage.

86 Two comments are necessary here. First, assessment of an agreement's substantial compliance with the entire Act will necessarily permit a broader gamut of arrangements than would be the case if testing agreements narrowly against the support order objectives in s. 15.2(6). Second, a determination that an agreement fails to comply substantially with the Act does not necessarily mean that the entire agreement must be set aside and ignored. Provided that demonstrated vulnerability and exploitation did not vitiate negotiation, even a negotiated agreement that it would be wrong to enforce in its totality may nevertheless indicate the parties' understanding of their marriage and, at least in a general sense, their intentions for the future. Consideration of such an agreement would continue to be mandatory under s. 15.2(4). For example, if it appeared inappropriate to enforce a time limit in a support agreement, the quantum of support agreed upon might still be appropriate, and the agreement might then simply be extended, indefinitely or for a different fixed term.

(b) *Stage Two*

87 Where negotiation of the agreement is not impugned on the basis set out above and the agreement was in substantial compliance with the general objectives of the Act at its time of creation, the court should defer to the wishes of the parties and afford the agreement great weight. Nevertheless, the vicissitudes of life mean that, in some circumstances, parties may find themselves down the road of

their post-divorce life in circumstances not contemplated. Accordingly, on the bringing of an application under s. 15.2, the court should assess the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act.

88 The parties' intentions, as reflected by the agreement, are the backdrop against which the court must consider whether the situation of the parties at the time of the application makes it no longer appropriate to accord the agreement conclusive weight. We note that it is unlikely that the court will be persuaded to disregard the agreement in its entirety but for a significant change in the parties' circumstances from what could reasonably be anticipated at the time of negotiation. Although the change need not be "radically unforeseen", and the applicant need not demonstrate a causal connection to the marriage, the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties' intentions at the time of execution and the objectives of the Act. Accordingly, it will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned.

89 We stress that a certain degree of change is foreseeable most of the time. The prospective nature of these agreements cannot be lost on the parties and they must be presumed to be aware that the future is, to a greater or lesser extent, uncertain. It will be unconvincing, for example, to tell a judge that an agreement never contemplated that the job market might change, or that parenting responsibilities under an agreement might be somewhat more onerous than imagined, or that a transition into the workforce might be challenging. Negotiating parties should know that each person's health cannot be guaranteed as a constant. An agreement must also contemplate, for example, that the relative values of assets in a property division will not necessarily remain the same. Housing prices may rise or fall. A business may take a downturn or become more profitable. Moreover, some changes may be caused or provoked by the parties themselves. A party may remarry or decide not to work. Where the parties have demonstrated their intention to release one another from all claims to spousal support, changes of this nature are unlikely to be considered sufficient to justify dispensing with that declared intention. That said, we repeat that a judge is not bound by the strict *Pelech* standard to intervene only once a change is shown to be "radical". Likewise, it is unnecessary for the party seeking court-ordered support to demonstrate that the circumstances rendering enforcement of the agreement inappropriate are causally connected to the marriage or its breakdown. The test here is not strict foreseeability; a thorough review of case law leaves virtually no change entirely unforeseeable. The question, rather, is the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at the time of the application.

90 The court's focus should be on the agreement's continued correspondence to the parties' original intentions as to their relative positions and the overall objectives of the Act, not on whether a change occurred *per se*. That is to say, we do not consider "change" of any particular nature to be a threshold requirement which, once established, entitles the court to jettison the agreement entirely. Rather, the court should be persuaded that both the intervention and the degree of intervention are warranted. That is, at this stage, even if unbending enforcement of the agreement is inappropriate, that agreement may still indicate to a trial judge the parties' understanding of their relationship and their

intentions. Even an agreement that is not determinative as a result of the parties' circumstances at the time of the application warrants compulsory consideration under s. 15.2(4).

91 Although we recognize the unique nature of separation agreements and their differences from commercial contracts, they are contracts nonetheless. Parties must take responsibility for the contract they execute as well as for their own lives. It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act, that the court may be persuaded to give the agreement little weight. As we noted above, it would be inconsistent if a different test applied to change an agreement in the form of an initial order under s. 15.2 and to variation of an agreement incorporated into an order under s. 17. In our view, the Act does not create such inconsistency. We do not agree with the Ontario Court of Appeal when it suggests at para. 71, that once a material change has been found, a court has "a wide discretion" to determine what amount of support, if any, should be ordered, based solely on the factors set out in s. 17(7). As La Forest J. said in his dissent in *Richardson*, *supra*, at p. 881, an order made under the Act has already been judicially determined to be fit and just. The objectives of finality and certainty noted above caution against too broad a discretion in varying an order that the parties have been relying on in arranging their affairs. Consideration of the overall objectives of the Act is consistent with the non-exhaustive direction in s. 17(7) that a variation order "should" consider the four objectives listed there. More generally, a contextual approach to interpretation, reading the entire Act, would indicate that the court would apply those objectives in light of the entire statute. Where the order at issue incorporated the mutually acceptable agreement of the parties, that order reflected the parties' understanding of what constituted an equitable sharing of the economic consequences of the marriage. In our view, whether acting under s. 15.2 or under s. 17, the Court should take that into consideration.

C. *Application to the Facts of this Case*

92 In the circumstances of this appeal, we are of the view that the global Separation Agreement should be accorded significant and determinative weight. Looking to the Separation Agreement at the time of its formation, we find nothing to indicate that circumstances surrounding the negotiation and execution of the agreement were fraught with vulnerabilities. On the contrary, the record reveals that these parties underwent extensive negotiation over a substantial time period and engaged the services of several professionals, including experienced and expert counsel. Negotiation of the Separation Agreement lasted some 15 months. Ms. Miglin, in addition to legal advice, received detailed financial advice, both in terms of tax planning and income projections, throughout the negotiation process.

93 At the trial, Ms. Miglin suggested that she was not content with the Separation Agreement and felt pressured by her husband to agree to the spousal support release. As she phrased it, it was a confusing and emotional time for her. We do not doubt that marital separation is almost inevitably a

time of emotional upheaval and confusion. Regardless, in this case there is ample evidence to conclude that any vulnerability experienced by Ms. Miglin was more than adequately compensated by the independent and competent legal counsel representing her interests over a prolonged period, not to mention the services provided to her by other professionals. It is unnecessary, therefore, for us to determine whether Ms. Miglin's evidence relating to her personal feelings would have been sufficient to demonstrate a vulnerability in this case and, if so, whether that vulnerability was exploited. The extent of Ms. Miglin's professional assistance obviously comes at the upper end of the range, and we would not wish to suggest that hers was the minimum required to assure fair negotiation.

94 Turning to the substance of the Separation Agreement, we also find nothing to demonstrate a significant departure from the overall objectives of the *Divorce Act*. At the time of separation both the Lodge and the matrimonial home had net values of approximately $500,000. The Separation Agreement provided for Ms. Miglin to transfer to Mr. Miglin her one-half interest in the Lodge in exchange for the transfer to her of his one-half interest in the matrimonial home. Mr. Miglin agreed to assume sole responsibility for the mortgage on the house. We cannot agree with the trial judge's characterization of this arrangement as not an equal split. He made this assessment on the basis that the business was income-producing and the house was not. Valuation of an asset necessarily takes into account its characteristics, including its potential income, capital appreciation and risks. In the same way that a single asset should not be counted twice (*Boston v. Boston*, [2001] 2 S.C.R. 413, 2001 SCC 43), the factors that went into an asset's valuation should not be considered a second time. Presumably, viewed subjectively, in light of Mr. Miglin's and Ms. Miglin's respective abilities, interests and needs, the business was of greater interest to him and the matrimonial home more attractive to her. That is why they divided the assets as they did. There was no basis for the trial judge to conclude that one asset was worth more than another of identical value. In our view, the division in the Separation Agreement reflects the parties' needs and wishes and fairly distributed the assets acquired and created by them over the course of their marriage.

95 The Separation Agreement also provided that Ms. Miglin would receive child support in the amount of $1,250 per month, per child, for an annual total of approximately $60,000, taxable in her hands and tax-deductible to Mr. Miglin. The child support arrangement was subject to both an annual cost of living increase and the caveat that it would be revisited, if necessary, once reasons for judgment were released from this Court in *Thibaudeau*, *supra*, or Parliament enacted legislation that altered the child support tax scheme. The record reveals that the quantum of child support was arrived at in full contemplation of Ms. Miglin's spousal support release. We also note that correspondence between counsel suggests that it was Ms. Miglin's preference to release Mr. Miglin from spousal support on condition that her economic needs were addressed through child support.

96 The Consulting Agreement, executed between the Lodge and Ms. Miglin, was for a term of five years, with an option to renew on the consent of both parties. Both the trial judge and the Court of Appeal found this arrangement to be "thinly veiled spousal support." If it was, there should be no pejorative sense to the term. If the commercial contract is construed as a form of spousal support, it simply means that the agreement contains a time-limited spousal support agreement with a renewal option, rather than a total waiver of spousal support. Either way, neither is intrinsically unfair nor

contrary to the objectives of the Act. There is nothing inherently sinister about a release or a waiver any more than there is about a time-limited arrangement. Any support clause has to be assessed in the full context of the broader agreement, the overall circumstances of the parties, and the degree of compliance with the objectives of the Act. In our view, the Consulting Agreement reflects the parties' intentions to provide Ms. Miglin with a source of employment income for a limited time. That the parties chose such a method to provide the income to Ms. Miglin does not detract from the commercial nature of the contract. Moreover, the vehicle chosen is appropriate to the manner in which the parties structured their economic lives during the marriage.

97 It is true that Ms. Miglin stopped receiving her salary of $80,500 from the Lodge. The obvious reason, though, is that she had also stopped working more or less full-time for the Lodge. During the marriage she had hired babysitters to permit her to work at the Lodge. After the separation she could hire babysitters so she could work for a new employer. Or, as in fact she chose, she was free not to seek other employment and to support herself and her children, during the five years of the Consulting Agreement, on the combined income of roughly $75,000 consisting of $60,000 in child support and $15,000 from the Consulting Agreement. Her own financial analyst's tables indicated her choice not to work. Recall too that, since Mr. Miglin had assumed sole responsibility for the mortgage on the matrimonial home, Ms. Miglin's expenses included no rent or mortgage payments.

98 It is in the context of these arrangements that the final release and waiver of spousal support must be assessed. Overall, the Separation Agreement provided for a certain level of revenue to the wife, in the form of ongoing child support and the consulting fees for a five-year period, with a possibility of renewal. In this way, the Agreement sought to redress any disadvantages arising from the marriage and its breakup in part through the vehicle of the business which was, as it had been throughout the marriage, the parties' major source of income. At the same time, the Separation Agreement sought to facilitate the disentanglement of the parties' economic lives and promote their self-sufficiency. The Separation Agreement advances the 1985 Act's goals of finality and autonomy. During the marriage, Ms. Miglin continued her education (obtaining her B.A.), earned a salary and obtained work experience; a case was therefore not made out for compensatory support. It is unnecessary, therefore, to determine whether the Separation Agreement would still have complied substantially with the objectives of the Act on facts closer, say, to those in *Moge*.

99 Accordingly, we find the Separation Agreement at the time of its formation to have been in substantial compliance with the *Divorce Act*.

100 The Court of Appeal found that, at the time of the support application, the non-renewal of the Consulting Agreement and changes in the child-care arrangements constituted a material change sufficient to justify overriding the spousal support release. As we noted earlier, we do not accept the Court of Appeal's "material change" test as the appropriate basis for dispensing with an otherwise enforceable agreement. Still, with respect to the findings, we believe them to be in error.

101 With respect to the Consulting Agreement, we note that Ms. Miglin brought her application for corollary relief in June of 1998 — prior to the expiry of the five-year term of the contract. Moreover, the parties agree that Ms. Miglin performed the terms of her contract for a period but performed no work for the Lodge, contrary to the Consulting Agreement, for the last two years of the contract. She did, however, continue to receive payment under that contract until its expiry in December 1998. Needless to say, Mr. Miglin opted not to renew the Consulting Agreement at the end of its term. We fail to see how, at the time of application, the ongoing receipt of payment for services not being performed can constitute a change of any kind.

102 Regarding the purported changes to the child-care arrangements, the *ad hoc* parenting arrangements that developed during the period of amicable relations between the parties no doubt reflected the changing needs of the growing children. These changes are an ordinary fact of life. We note too that by the time of the trial, the eldest child was residing primarily with Mr. Miglin.

103 Moreover, even if we accept that the expiry of the Consulting Agreement can be construed as occurring at the time of Ms. Miglin's application, we do not consider its non-renewal to be sufficient to render continued reliance on the original agreement inappropriate. First, the contract stipulated that renewal required the consent of both parties. Second, the income projections and tax planning advice provided by Ms. Miglin's accountant at the time of negotiation carried that assumption and thus made her fully aware that she would be without that income in five years. Third, there is no evidence of any damaging long-term impact of the marriage on Ms. Miglin's employability or that at the time of negotiation she underestimated how long it would take to become self-sufficient. Ms. Miglin is an educated woman with employable skills who worked in the business throughout the marriage. Although she is no doubt responsible for the day-to-day care of the three children residing with her, she has previously demonstrated her willingness to engage childcare services. The parties dispute whether Ms. Miglin attempted to pursue any employment. What is clear from the correspondence between counsel during negotiation of the agreement, however, is that Ms. Miglin had no intention of working.

104 The only real changes we see are the variation of the child support award in accordance with the Guidelines and the fact that the eldest child is now residing primarily with Mr. Miglin. The quantum of child support established in the Agreement provided Ms. Miglin with a minimum amount of income in contemplation of her not working. Her lawyer, in a letter to Mr. Miglin's counsel, states: "She is clearly not going to be working. Taking care of the children is a full time job at this time. It does not change the nature of the spousal support release anyway . . . ." Furthermore, the correspondence makes it clear that Ms. Miglin contemplated a reduction in income when the Consulting Agreement ended and was advised by her accountant to plan ahead for this drop in income. In our view, the change to the obligations regarding childcare did not take Ms. Miglin's current position outside the reasonable range of circumstances that the parties contemplated in making the Separation Agreement.

105 At the Court of Appeal, counsel for Ms. Miglin suggested that her financial position deteriorated after the breakdown of the marriage. The record demonstrates (and she concedes), however, that her net worth in fact increased by at least 20 percent. At the time of her support application, a financial statement dated June 2, 1998, filed as part of the record, valued her net worth at $750,000 with essentially no debt. The statement shows that she held $246,000 in RRSPs, $83,000 in cash, and an unencumbered five-bedroom home valued at $395,000. The only debt listed on the statement was an unsubstantial debt for a credit card. By the time of trial, one year later, she valued her home at $400,000. There was no evidence that the terms of the agreement resulted in conditions under which Ms. Miglin could not assure her family's livelihood and had to deplete her assets, thus bringing her outside the range of circumstances in which she pictured herself at the time of executing the Separation Agreement.

106 The respondent's evidence and argument regarding her circumstances at the time of her support application fail to demonstrate that the agreement fairly negotiated and substantially compliant with the objectives of the 1985 Act at its formation should not continue to govern the parties' post-divorce obligations towards each other.

VI. Disposition and Costs

107 For the reasons discussed, we would reverse both the decision of the trial judge and that of the Court of Appeal with respect to the application for spousal support. In these circumstances, both courts erred in giving the parties' agreement insufficient weight. On this issue, therefore, the appeal is allowed. With respect to the reasonable apprehension of bias, we would affirm the decision of the Court of Appeal. Given the result, we do not find a cost award to be appropriate in this Court. The parties shall bear their own costs.

The reasons of LeBel and Deschamps JJ. were delivered by

LEBEL J. (dissenting) —

I. Introduction

108 This appeal concerns an application for corollary relief under s. 15.2 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) ("1985 Act"), in the face of a spousal support agreement entered into by

the parties at the time of their separation, but not incorporated into their divorce order. The Court must first determine whether the *Pelech* trilogy (*Pelech v. Pelech*, [1987] 1 S.C.R. 801; *Richardson v. Richardson*, [1987] 1 S.C.R. 857; and *Caron v. Caron*, [1987] 1 S.C.R. 892) continues to govern the threshold for judicial intervention in the spousal support provisions of a final separation agreement. If not, what threshold should apply in light of the 1985 Act and the current jurisprudence?

109 I have had the benefit of reading the majority's reasons but, with respect, I do not agree with them in the result or in principle. Given the nature of the disagreement, I find it necessary to provide my own overview of the background in this case and the decisions in the courts below.

110 Because I conclude that the trilogy no longer applies and because the 1985 Act itself clearly sets out the objectives of spousal support, I find that Parliament intended to permit courts to order corollary relief under s. 15.2 where the parties' agreement does not reasonably realize the spousal support objectives indicated in the Act. Because the Miglins' agreement does not reflect these objectives, and in fact explicitly disavows them, I would dismiss the appeal and allow Ms. Miglin to receive the relief to which she is entitled under s. 15.2.

111 This case also requires the Court to determine whether the comments and interventions of the trial judge give rise to a reasonable apprehension of bias. I concur with the majority's findings on this issue.

II. Background

112 Eric and Linda Miglin were married on February 17, 1979. They had four children: Samantha, born October 4, 1985; Alexandra, born October 31, 1988; Charlotte, born December 31, 1989; and Jonathan, born March 18, 1991. They separated after 14 years of marriage in 1993.

113 When the parties met in 1976, both were employed by the Toronto Dominion Bank. Mr. Miglin, then a newly minted Harvard M.B.A., was a management trainee. Ms. Miglin worked in an administrative role. Mr. Miglin left his position at the Bank to operate concession stores in Algonquin Provincial Park with his brother. In 1978, Mr. Miglin invited Ms. Miglin to work for his new business and she agreed, quitting her job at the Bank to work for him.

114 After marrying in 1979, the parties purchased a hotel business in Algonquin Park, Killarney Lodge Limited (the "Lodge") for $1,015,000 in 1984. They became equal shareholders in the

corporation which owned the Lodge. The Lodge business served as the family's primary source of income throughout the course of the marriage. As the trial judge outlined, by the date of the parties' separation in 1993, the parties' combined efforts had "pumped up" the business substantially; at the time of trial, the Lodge had yearly gross earnings of about $1.5 million.

115 The parties' representations of their respective roles in the business diverge, but it is clear that Mr. Miglin was in charge of the overall management of the business, while Ms. Miglin was responsible for its administrative and housekeeping aspects. The trial judge found that Ms. Miglin and her husband had contributed equally to the success of their business. In addition, Ms. Miglin had earlier contributed significantly to the development of the outfitting business, Alquon Ventures Inc. ("Alquon"), co-owned by Mr. Miglin and his brother. At the time of separation, Ms. Miglin was earning a salary from the Lodge representing roughly half of the net profits of the business, approximately $80,500 per annum.

116 Ms. Miglin was the primary caregiver of the four children throughout the marriage. While the children were very young, both parties lived and worked at the Lodge from May until October, hiring a babysitter to assist with childcare. At the end of the season, usually in November, Mr. Miglin would take a vacation alone. During the off-season, the parties resided in Toronto. Once the eldest child started school, the family would spend the summer months together at the Lodge but, when school started in September, Ms. Miglin would return to Toronto with the children. The family followed a similar pattern in the spring, with Mr. Miglin returning to Algonquin Park some months before Ms. Miglin and the children joined him there for the summer season.

117 In 1993, the parties separated. After protracted negotiations during which both parties were represented by independent legal counsel, they entered into three agreements: a Separation Agreement signed by Mr. Miglin on June 15, 1994 and by Ms. Miglin on June 17, 1994; a Parenting Plan signed by Mr. Miglin on June 15, 1994, and by Ms. Miglin on June 17, 1994; and a Consulting Agreement "made as of February 28, 1994" that was signed, but not dated, by both parties (with Mr. Miglin signing "per Killarney Lodge Limited").

118 The Separation Agreement provided for a division of the parties' property. At the time of the separation, the parties had three main assets: the jointly owned Lodge; the matrimonial home in Toronto; and the husband's one-half interest in Alquon. Ms. Miglin transferred her one-half interest in the Lodge, which had been valued at the time of separation at $250,000, in exchange for Mr. Miglin's one-half interest in their matrimonial home, also valued at $250,000 although, as the trial judge noted, a non-income producing asset. Mr. Miglin assumed sole responsibility for the mortgage on the matrimonial home. The Separation Agreement also provided that Ms. Miglin release any claim to Alquon, to which no value was assigned under the Agreement.

119 The Separation Agreement provided for child support in the amount of $1,250 per month per child (totalling $5,000), so long as the children's principal residence continued to be with Ms. Miglin. The child support payments were subject to an annual cost of living increase, which is standard for child support.

120 While providing for child support, the Separation Agreement contained the following spousal support release:

> a. The Husband and the Wife each agree that neither shall be obliged to make any payment or payments in the nature of support, or any similar payment, whether periodic or by way of lump sum, directly or indirectly, to or for the benefit of the other. Without restricting the generality of the foregoing, the Husband and the Wife further agree that neither of them shall maintain, commence or prosecute or cause to be maintained, commenced or prosecuted any action against the other of them for support or interim support pursuant to the Family Law Act, the Succession Law Reform Act or any comparable Provincial legislation in force from time to time, or the Divorce Act, or any successor or similar legislation whereby a spouse or former spouse is given a cause of action against his or her spouse or the spouse's estate for relief in the nature of support.
>
> b. The Wife specifically abandons any claims she has or may have against the Husband for her own support. The Wife acknowledges that the implications of not claiming support in this Agreement have been explained to her by her solicitor. At no time now or in the future, including any future divorce proceedings, or upon the Husband's death shall the Wife seek support for herself, regardless of the circumstances.
>
> c. The Husband specifically abandons any claims he has or may have against the Wife for his own support. The Husband acknowledges that the implications of not claiming support in this Agreement have been explained to him by his solicitor. At no time now or in the future, including any future divorce proceedings, or upon the Wife's death shall the Husband seek support for himself, regardless of the circumstances.
>
> d. The parties are aware that this is a final Agreement and intended to be a final break between them. No further claims will be made against either party by the other arising from the marriage or upon the dissolution thereof, including any claims under Section 15 of the Divorce Act or upon the death of one of them. Both parties are aware of the possibilities of fluctuation in their respective incomes and assets, are cognizant of the possible increases and decreases in the cost of living and are aware that radical, material, profound or catastrophic changes may affect either of them. Each party is prepared to accept the terms of this Agreement as a full and final settlement and waive all further claims against the other, except a claim to enforce the terms of this Agreement or for dissolution of their marriage. The parties specifically agree and acknowledge that there is no causal connection between

the present or any future economic need of either party and their marriage. No pattern of economic dependency has been established in their marriage.

121 Although Ms. Miglin received no spousal support under the Separation Agreement, the concurrent Consulting Agreement provided her with $15,000 in annual income from the Lodge ostensibly for services such as updating and revising mailing lists, writing newsletters, confirming reservations, helping with advertising and promotion, and advancing the Lodge's image at trade shows. The Consulting Agreement provided for five years of consulting fees for Ms. Miglin for the period from 1994 to 1998, with the possibility of renewal. The consulting payments were subject to an annual cost of living increase, which is unusual for this type of payment. Ms. Miglin performed some work for the Lodge in the first two years after the Consulting Agreement was signed, but this had stopped apparently without objection by the third year of the five-year Agreement. Ms. Miglin nonetheless continued to receive the agreed upon amounts until Mr. Miglin failed to renew the Consulting Agreement in December of 1998, a decision that coincided with a deterioration in the parties' post-separation relationship.

122 The Parenting Plan, which was incorporated into the Separation Agreement, set out the parties' parenting responsibilities. The parties were to share responsibility for raising the children, but the children's principal residence was to be with Ms. Miglin. The Plan contemplated that Ms. Miglin would essentially be the children's sole caregiver during the four "shoulder months" of the year when the children were in school in Toronto while Mr. Miglin was at the Lodge. During the remainder of the year, Ms. Miglin was the children's primary caregiver, though Mr. Miglin had extensive access to the children. The trial judge noted that, over time, the parties deviated from the Parenting Plan, making their own *ad hoc* arrangements for the welfare of the four children. Under these *ad hoc* arrangements, Ms. Miglin remained the children's primary caregiver.

123 The trial judge found that Mr. Miglin and Ms. Miglin appeared to be able to arrange their affairs and the affairs of their children in a reasonable fashion under their three agreements until about 1997. The Miglins' divorce was finalized on January 23, 1997. The divorce order made no provision for corollary relief either in the form of child support or spousal support payments.

124 Several months after the divorce, Ms. Miglin sold the matrimonial home in downtown Toronto. She used the proceeds to repay debts she had incurred post-separation, and she purchased a new home in Thornhill for herself and the children. Her personal reasons for relocating included her growing interest in, and study of, Orthodox Judaism; she converted to Judaism in the spring of 1999.

125 Although Mr. Miglin had shared a cooperative post-separation relationship with Ms. Miglin, he changed his behaviour as a result of Ms. Miglin's relocation to Thornhill and her conversion

to Judaism, both of which, as the Court of Appeal noted, he objected to. The trial judge described this change in Mr. Miglin, whom he characterized as a "strong-willed, intelligent and manipulative individual", as a dramatic one ((1999), 3 R.F.L. (5th) 106, at para. 10). He observed at paras. 14 and 16-18:

> . . . he became aggressive, dominating, and often acted in an outlandish fashion towards her and her children. After the Fall closing of the hotel at the end of the 1997 season, the Respondent appears to have made up his mind to go to school with his children. Almost every day saw him seated behind one of them in their public school classroom, listening with them to their lessons, and, no doubt, reviewing and discussing the significance of what they were receiving from their teachers. He became involved in the parent/teacher association. It appears to me that his focus on his children became obsessive. Ultimately, he was ordered by a Superior Court judge not to go to school with them. That order was subsequently rescinded.
>
> . . .
>
> When the Petitioner decided to move from the matrimonial home in Toronto and strike out on her own in Thornhill, the respondent became noticeably upset. His attitude towards his wife, her need for support and her custody of the children changed abruptly. The Petitioner's move made it clear he was no longer in control. As a result of that rapid change of spirit, the Respondent caused the hotel not to extend the consulting agreement. Shortly after the Petitioner's move to Thornhill, the husband began a campaign to involve himself in all aspects of the children's lives, particularly their schooling. His obsessive involvement with his children was oppressive to them. They were disturbed by his continued presence in school. The Respondent attempted to pre-empt the applicant's time with the children. He demanded, whenever possible, full time involvement with the children to the exclusion of their mother. In my opinion, he was unreasonable in his demands. He intensified the tension between himself and the petitioner to the point where the applicant became almost unable to meet her obligations to her young family and to her private life.
>
> As a result of the increasing pressure applied by the Respondent, the children became harder and harder to manage, and in the end, the eldest child, left her mother to live with her father in Toronto. . . .
>
> The Petitioner claims that the circumstances surrounding her life and the lives of her children were altered dramatically with the change of attitude of the Respondent after her move to Thornhill. . . . His escalated interference in the day to day lives of the children caused them great stress. He confronted his former wife on every occasion; he was

determined to make her life unhappy.

126 In June 1998, Ms. Miglin brought proceedings pursuant to s. 15.2 of the 1985 Act for sole custody, spousal support, and child support in accordance with the *Federal Child Support Guidelines*, SOR/97-175. In December 1998, Mr. Miglin terminated all payments under the Consulting Agreement and refused to renew it.

127 At the time of the trial, Mr. Miglin was 50 years old. He held an M.B.A. from Harvard University. He owned a home in downtown Toronto. He was the sole owner of the Lodge and co-owner of the successful Alquon outfitting business, each of which the trial judge found was generating an annual gross income of approximately $1.5 million. His annual income was determined at trial to be approximately $200,000.

128 At the time of the trial, Ms. Miglin was 47 years old. She held a Bachelor of Arts in English Literature from the University of Toronto, which she had earned during the early years of the marriage. She owned a home in Thornhill and had investments in RRSPs, made in part with monies borrowed from friends and received from the sale of the matrimonial home. She continued to assume a majority of the childcare responsibilities in the post-separation period, as she had during the marriage, and at the time of the trial she was a full-time mother and homemaker. She was receiving support for her children in the amount of $67, 200 per annum. Ms. Miglin had not worked outside of the family business since 1978 and she had not worked outside of the home, with the exception of the consulting work for the Lodge, since the parties separated in 1993. With the cessation of the payment of monies under the Consulting Agreement, she had no independent source of income beyond a minimal amount of investment income. After the separation, it appears that Ms. Miglin did not actively seek employment, as she felt that most of her time was taken up dealing with childcare and with the problems arising from the breakdown of the marriage.

129 The trial judge awarded Ms. Miglin $4,400 per month in spousal support for a period of five years and $3,000 in monthly support for the children, all but the eldest of whose principal residence would continue to be with her. The Court of Appeal dismissed Mr. Miglin's appeal, but granted Ms. Miglin's cross-appeal, eliminating the five-year term from the award of spousal support. Child support was reduced by agreement of the parties, based upon a more accurate determination of Mr. Miglin's income as $186,130 per annum. Mr. Miglin now appeals from the decision of the Court of Appeal with regard to Ms. Miglin's entitlement to spousal support, arguing that she waived her right to any support by signing the Separation Agreement.

III. Judicial History

A. *Ontario Superior Court of Justice* (1999), 3 R.F.L. (5th) 106

130 On the issue of custody and access, Tobias J. noted that, at the completion of trial, the parties had agreed to joint custody of the children. Tobias J. held that, while both parents were to have generous access to all four children, the principal residence of the three younger children would be with Ms. Miglin, while the eldest child would live with Mr. Miglin. He rejected as "patently not in the best interests of the children" (para. 11) a Parenting Plan that Mr. Miglin proposed under which the children would live with him in Toronto every other week and, during those periods, be driven daily by him to their school in Thornhill.

131 Tobias J. also expressed concern over what he found to be Mr. Miglin's aggressive and dominating attitude towards Ms. Miglin and the children after Ms. Miglin moved the family to Thornhill. He found that Mr. Miglin's obsessive involvement with all aspects of the children's lives, and particularly their schooling, during this period was oppressive to them. His order included restrictions on Mr. Miglin's attendance at the children's school, as Mr. Miglin had adopted the habit of sitting in on his children's classes.

132 On the issue of spousal support, Tobias J. did not accept that Ms. Miglin had actually waived her entitlement to support. He pointed to the Consulting Agreement, describing the payments under the Agreement as "thinly disguised spousal support" (para. 27): "[c]learly, this type of consulting agreement was a convenient vehicle [for Mr. Miglin] to provide spousal support to his wife without paying it out of his own pocket. These payments as expenses of the hotel likely improved the incidence of taxation of the Respondent and his corporation" (para. 15).

133 Tobias J. held that the alleged threshold test of "a radical unforeseen change in circumstances" (para. 18) that is causally connected to the marriage did not apply to applications for corollary relief under s. 15 of the 1985 Act, such as that of Ms. Miglin. Rather, in determining whether the provisions of an informed separation agreement bind the parties at the time of the application, the court's role under s. 15 is to scrutinize the separation agreement to decide whether it provides support to the dependent spouse in a fashion consistent with the social policies and objectives set out in s. 15(7) (now s. 15.2(6)). Where an agreement contains an element of unfairness to one of the spouses which is inconsistent with the objectives of s. 15(7), the court need not enforce it, and can enter a support order that diverges from the agreement in order to ensure that the objectives in s. 15(7) are met.

134 Tobias J. found such unfairness on the facts of the case (at para. 27):

> In my opinion, the separation agreement, of which the parenting plan and the consulting agreement form a part, treats the applicant unfairly because it provides for the transfer of the

> one-half interest of the applicant in the hotel corporation for the sum of $250,000.00 and proposes to replace her annual salary of $80,200.00 with the consultation contract which provided $15,000.00 per annum plus a cost of living index. In my opinion, the payments under the consulting contract are thinly disguised spousal support payments, which amount to less than twenty-five percent of the annual salary earned by the Applicant as an owner of a one-half interest in the hotel corporation before separation. The separation agreement provides that the Respondent convey to the applicant his one-half interest of $250,000.00 in the matrimonial home, a non-producing income asset, for the one-half interest of the applicant in the hotel corporation having the same value, $250,000.00. It is interesting to note that within approximately three years following the evaluation of $500,000.00 obtained by the parties after separation, the hotel corporation was producing an annual gross profit of close to $1,000,000.00. The total purchase price paid by the parties for the hotel operation in 1981 was that same amount, $1,000,000.00. In my opinion, the provisions of the separation agreement suffer from a fundamental inequality of matrimonial asset distribution.

135 In Tobias J.'s view, in these circumstances the releases and waiver contained in the Separation Agreement were not a bar to a claim for relief under s. 15. Given that the provisions of the Separation and Consulting Agreements failed to conform to the objectives enunciated in s. 15(7), the court was obliged to undertake a review under s. 15(5) (now s. 15.2(4)) of the conditions, means, needs and other circumstances of each spouse, including the length of time the spouses cohabitated and the functions performed by the spouses during the cohabitation. The court was required to assess these factors in light of the economic consequences for both parties of the marriage and its breakdown in order to determine whether support was warranted and, if so, in what amount.

136 Applying s. 15 to the matter at bar, Tobias J. determined that Mr. Miglin, according to his last income tax return, had an annual income of $172,370. In addition, Mr. Miglin received $30,000 per annum from his common-law spouse for her share of the rent of the couple's home in Toronto, for a total annual income of approximately $200,000. Although describing Mr. Miglin's evidence that he did not receive substantial income from the Alquon outfitting business as "equivocal and evasive" (para. 31), Tobias J. was ultimately unable to quantify the amount of Mr. Miglin's income from this source. While he ventured the opinion that Mr. Miglin's annual income from this business exceeded $100,000, he concluded that there was insufficient evidence upon which to make a conclusive finding on this point.

137 Tobias J. held that, once the payments due under the Consulting Agreement ended, Ms. Miglin had no income and that she continued to have no income at the time of the trial. He noted that Mr. Miglin was fully aware at the time of negotiating the Separation Agreement that Ms. Miglin would be involved in the full-time care of the parties' four children and that, as a result, there was little possibility that she could become economically self-sufficient until the children matured. Notwithstanding the language in the Separation Agreement, it was beyond doubt that a pattern of economic dependency had been established in the marriage and that it continued to affect Ms. Miglin.

138 As indicated above, Tobias J. found that Ms. Miglin was entitled to spousal support of $4,400 per month for a period of five years. Based upon Mr. Miglin's annual income, and the *Federal Child Support Guidelines*, he awarded Ms. Miglin child support of $3,000 per month.

B. *Ontario Court of Appeal* (2001), 53 O.R. (3d) 641

139 Abella J.A. declined to interfere with the trial judge's conclusion, which she found to be reasonably supported on the evidence, that Mr. Miglin's proposal that the children spend every other week with him was patently not in the children's best interests. She approved the agreed-upon joint custody plan, and upheld the trial judge's order with regard to the children's principal residences. Abella J.A. also lifted the trial judge's order restricting Mr. Miglin's attendance at the children's school. She found that, since it was no longer Mr. Miglin's practice to sit in on his children's classes, which had caused the children significant discomfort, the order was no longer necessary.

140 As indicated above, Abella J.A. varied the quantum of child support to $2,767 per month in accordance with the parties' concession that there had been an error in the calculation of Mr. Miglin's income at trial.

141 On the issue of spousal support, Abella J.A. agreed with Tobias J.'s characterization of the Consulting Agreement as "thinly disguised spousal support". She noted that, since the payments under the Consulting Agreement were found by the trial judge to be support payments, the parties must have anticipated the possibility that such support would still be required beyond the initial five years, since they negotiated a flexible renewal clause of indeterminate duration.

142 On the question of Ms. Miglin's entitlement to support, Abella J.A. rejected Mr. Miglin's argument that the release of spousal support in the Separation Agreement triggered the application of the *Pelech* trilogy. Abella J.A. held that the *Pelech* trilogy's threshold for the variation of final agreements, decided under the provisions of the *Divorce Act*, R.S.C. 1970, c. D-8 ("1968 Act"), did not have any application under the substantially amended support provisions in the 1985 Act (at para. 60):

> In my view, based on the new language in the 1985 *Divorce Act*, and the revised approach to support developed by the Supreme Court of Canada in accordance with those statutory changes, it is difficult to justify the continued application of the trilogy which emanated from a completely different statutory scheme. The language in s. 15 of the 1985 *Divorce Act* is so dramatic a departure from the linguistic and conceptual minimalism of s. 11 of the former *Divorce Act* that statutory interpretations emanating from the old

legislation, such as the trilogy, cannot, it seems to me, continue to apply.

143 Abella J.A. stressed as the major difference between the 1968 Act and the 1985 Act the fact that, while the former Act did not set out support objectives, the latter Act established a "comprehensive scheme" for support. Given this key difference, Abella J.A. held that it was crucial to examine the 1985 scheme, rather than resorting to the trilogy, for guidance on how agreements are now to be treated.

144 Abella J.A. noted that, in contrast to s. 11 of the 1968 Act, which made no explicit reference to separation agreements, s. 15.2(4) of the 1985 Act provides that agreements are one of several factors for courts to consider in awarding support. Abella J.A. recognized that s. 15.2(4), which is animated by the objectives for ordering spousal support outlined in s. 15.2(6), does not give an agreement primacy, nor does the 1985 Act provide explicit direction as to how a court is to factor an agreement into the assessment of whether or how much support should be awarded.

145 Though noting the absence of any legislative requirement to defer to separation agreements in the 1985 Act, Abella J.A. justified according some measure of deference to parties' arrangements on the basis that court orders and agreements are referred to together in s. 15.2(4)(*c*). In Abella J.A.'s view, both court orders and private agreements represent a kind of economic certainty around which parties have arranged their affairs and with which courts should not lightly interfere. For support on this point, she cited s. 17(4.1) of the 1985 Act which stipulates that a court order for spousal support may only be varied if there has been a change in circumstances, defined by this Court in *Willick v. Willick*, [1994] 3 S.C.R. 670, at p. 688, as a material change which, if known at the time, would likely have resulted in different terms.

146 Abella J.A. reasoned that if a court order could be varied by meeting a threshold of material change, it was difficult to conceive of why a separation agreement should be subjected to a different or higher threshold before a court could review what amount of support, if any, was justified. While court orders could be "presumed to be in reasonable compliance with the objectives of the Act by virtue of their having received judicial screening or scrutiny", parties' own agreements could be "deemed to be in reasonable compliance only with the negotiated wishes of the parties" (para. 73). Abella J.A. thus held that there was no basis in the current Act for imposing a threshold as stringent as the one pronounced in the trilogy for overriding separation agreements.

147 Abella J.A. stressed that it had been open to Parliament when it amended the *Divorce Act* in 1985 to limit the vulnerability of agreements to judicial review and variation by requiring deference to their terms. In the absence of any such statutory direction, the court should look for guidance to the overall scheme of the support provisions in the 1985 Act, which establish economic equity as the

overriding objective. In this regard, Abella J.A. expanded her analysis of s. 15.2 to include a review of the recent jurisprudence of this Court, including *Moge v. Moge*, [1992] 3 S.C.R. 813, and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420. In her view, this jurisprudence reinforced the conclusion she had reached on a plain reading of s. 15.2 of the 1985 Act: "there has been so significant a change in the legislative directions for awarding spousal support in the 1985 *Divorce Act*, that judicial interpretations founded on the old language cannot survive, let alone prevail" (para. 76).

148 Abella J.A. emphasized that the stringent threshold for variation under the trilogy was rooted not only in a belief in reinforcing the rights of parties to arrange their affairs with finality, but also in the "clean break" theory of spousal support, and the concept of the state as the ultimate provider. She found these principles to be inconsistent with the philosophies of spousal support that this Court has outlined in its recent jurisprudence. As L'Heureux-Dubé J. stressed in *Moge*, in applications for corollary relief, courts must be attentive to all four of the objectives in s. 15.2. Within this legislative framework, self-sufficiency, the primary support objective prevailing at the time of the trilogy, can no longer be prioritized at the expense of equally important goals.

149 In addition to discussing *Moge* and *Bracklow*, Abella J.A. referenced in some detail the minority judgment of L'Heureux-Dubé J. in *G. (L.) v. B. (G.)*, [1995] 3 S.C.R. 370. Abella J.A. agreed in principle with L'Heureux-Dubé J.'s finding that, while parties should continue to be encouraged to resolve their disputes by agreement under the 1985 Act, the question of whether their autonomous decision-making capacity will be insulated from judicial scrutiny and thus whether their agreement will be final depends on the degree to which the terms of the agreement take into account the Act's objectives, even where the agreement was consensual and the parties were fully informed.

150 Abella J.A. concluded that the threshold for variation of a spousal support agreement in an application for corollary relief under s. 15.2 is whether there has been a material change in the parties' circumstances since the agreement was made. In other words, she imported the test from s. 17 into s. 15.2 so as to ensure that an agreement would be accorded some deference, but would not preclude attention to the other considerations enumerated in s. 15.2. She held that where the material change threshold is met, the court should determine what amount of spousal support, if any, is justified having regard to the statutory principles set out in s. 15.2 of the 1985 Act and refined in the leading cases from this Court.

151 On the facts, Abella J.A. held that two factors combined to represent a material change in circumstances. First, the extent of Ms. Miglin's childcare responsibilities was greater than had been anticipated in the Parenting Agreement. This had a negative impact on her range of employment options and thus affected her ongoing need for support. Second, the support Ms. Miglin had received through the vehicle of the Consulting Agreement had been terminated by Mr. Miglin despite her ongoing need. Having concluded that these factors represented a material change which, if known at the time, would likely have resulted in an agreement for ongoing spousal support, Abella J.A. turned to the question of whether, and to what extent, support should be ordered.

152 Abella J.A. held that the Consulting Agreement, which the trial judge had found to be the true agreement for spousal support, fell short of meeting the 1985 Act's objectives in s. 15.2(6) (at para. 100):

> . . . it took insufficient account, both in quantum and duration, of how fundamentally Ms. Miglin's role during the 15-year marriage had created a financial dependency on Mr. Miglin and impaired her capacity to become economically self-sufficient. Only Ms. Miglin experienced economic disadvantage or hardship arising from the marriage and its dissolution, yet the long-term financial consequences of her childcare responsibilities were not equitably acknowledged in the economic arrangements made by the parties.

153 Abella J.A. upheld the quantum of support awarded by the trial judge, concluding that it was not unreasonable in the circumstances. Abella J.A. removed, however, the trial judge's imposition of a five-year time limit on support, as she held that it was not easy to anticipate when and to what extent the disadvantageous impact of Ms. Miglin's childcare responsibilities on her earning capacities would be attenuated. The five-year limitation was thus "unhelpfully speculative" (para. 102).

154 In this fashion, Abella J.A., like the trial judge, used her authority under s. 15.2 to award corollary relief to Ms. Miglin in light of the deficiencies identified in the Separation Agreement and the Consulting Agreement.

155 In addition, Abella J.A. concluded that the trial judge's interventions did not raise a reasonable apprehension of bias.

IV. Analysis

A. *Issues*

156 The initial question to be addressed in this case is identical to that which confronted this Court in the *Pelech* trilogy: "Should the parties be held to the terms of their contract or should the court intervene to remedy the inequities now alleged by one of the parties to be flowing from the bargain previously entered into freely and on full knowledge and with the advice of counsel?" (p. 806) If the

Court does intervene, should the threshold for this intervention continue to be that established in the trilogy, or is a different approach required under the 1985 Act and in light of the current jurisprudence?

(1) The Trilogy's Key Precepts

157 The trilogy stands for the proposition that in order to vary the terms of a valid separation agreement whereby the parties have purported to settle finally the issue of spousal support, an applicant must show a radical change in circumstances that is causally connected to the marriage. This strict threshold test for judicial intervention was intended to foster finality in the affairs of former spouses. It reflected what Wilson J. termed the "overriding policy consideration" of encouraging people "to take responsibility for their own lives and their own decisions" (*Pelech*, *supra*, at p. 850).

158 It is important to stress, as Professor M. Shaffer and D. S. Melamed do, that the trilogy's privileging of finality was rooted in both practical and theoretical concerns: "Separation Agreements Post-*Moge*, *Willick* and *L.G.* v. *G.B.*: A New Trilogy?" (1999), 16 *Can. J. Fam. L.* 51. Practically speaking (at p. 53):

> Wilson J. clearly saw separation agreements as a desirable way of settling the spouses' affairs. In her view, separation agreements allowed parties to take responsibility for their lives by deciding how they — rather than the courts — would settle their affairs; they also provided parties with the freedom to sever the financial ties between them and to get on with their lives. To encourage people to enter into settlement agreements, Wilson J. held that the law should take the parties at their word. Adopting a deferential approach to agreements would, in Wilson J.'s opinion, create an incentive for people to settle rather than to go to court since they would have the certainty of knowing that their desires as expressed in the agreement would be respected.

More theoretically, Wilson J.'s insistence on finality reflected her stance on both "individual autonomy and gender equality" (at p. 53):

> In Wilson J.'s view, holding parties to their agreements manifested respect for people's ability to make important personal decisions; in contrast, overriding agreements too lightly based simply on the court's notion of fairness was "paternalistic." In a similar vein, Wilson J. opined that permitting the court to override settlements on the basis of systemic gender inequality would "ultimately reinforce the very bias" that the court would be seeking to

counteract.

159 The trilogy's emphasis on the promotion of individual responsibility and finality in the affairs of former spouses both reflected and promoted what is customarily labelled the "clean break" model of support, which had been strongly advocated in Lamer J.'s dissent in *Messier v. Delage*, [1983] 2 S.C.R. 401. This model, premised on an understanding of marriage as an equal partnership between autonomous individuals, views the primary goal of a support order as facilitating the economic self-sufficiency of the dependent former spouse as quickly as possible after the divorce. This allows the parties "to make new lives for themselves" without carrying forward any "ongoing contingent liability" for each other's misfortunes after the marriage (*Pelech*, at p. 851). The clean break theory of spousal support is of necessity buttressed by another theoretical assumption, that of the state as the ultimate provider, as Abella J.A. noted (para. 77).

160 The trilogy's approach to spousal support has generated extensive literature, much of which, as Abella J.A. observed, is critical of its "restrictive impact on the ability to redress the disadvantageous economic consequences of a separation" (para. 54). Academics have critiqued both the practical results of the trilogy's strict threshold — the enforcement of agreements that are unfair to one party, typically the wife — and the theoretical assumptions on which this threshold is premised. Wilson J.'s insistence on the "sanctity of spousal contracts" and her "supposed promotion of equal autonomy" did not stand uncontested even in their origins, with La Forest J. challenging Wilson J.'s approach in dissent in *Richardson*, *supra* (see J. W. Durnford and S. J. Toope, "Spousal Support in Family Law and Alimony in the Law of Taxation" (1994), 42 *Can. Tax J.* 1. As Durnford and Toope outline at p. 18:

> . . . La Forest J. questioned the model of rational choice implicit in the majority reasons in *Pelech* and *Richardson*. He noted that divorce is one of the most stressful occasions in any person's life and that many people do "very unwise things, things that are anything but mature and sensible, even when they consult legal counsel." Agreements should not be treated as sacrosanct in this emotionally fraught context. [Footnotes omitted.]

(See also *G. (L.) v. B. (G.)*, *supra*, at para. 35 (*per* L'Heureux-Dubé J.).)

161 Academic criticism went further still, with some commentators suggesting that the trilogy's insistence on the formal equality and autonomy of spouses may efface substantive gender inequalities and fail to recognize the complex patterns of economic dependence that may develop during a marriage (see, for example, M. J. Bailey, "*Pelech*, *Caron*, and *Richardson*" (1989-90), 3 *C.J.W.L.* 615; N. Bala, "Domestic Contracts in Ontario and the Supreme Court Trilogy: 'A Deal is a Deal'" (1988), 13 *Queen's L.J.* 1; the Honourable Madame Justice B. McLachlin, "Spousal Support: Is it Fair to Apply New-Style Rules to Old-Style Marriages?" (1990), 9 *Can. J. Fam. L.* 131).

162 The criticism of the support theories and objectives underpinning the trilogy points to the same conclusion that I find flows inevitably from two developments in the law subsequent to this Court's decisions in *Pelech* and its companion cases, namely that the high threshold for judicial scrutiny articulated in the trilogy is no longer good law. These developments, each of which I will discuss in some detail, are: (1) the 1985 amendments to the *Divorce Act* and (2) the more contextual approach to spousal support that characterizes this Court's recent jurisprudence. In light of these developments, it is no longer appropriate to require an applicant to demonstrate a radical change in circumstances that is causally connected to the marriage before a court may intervene in a "final" support agreement. Instead, a more flexible and contextual approach must be applied, as well as a broader view of causation in the context of the untangling of marital relationships.

(2) The Parties' Agreements

163 Prior to exploring why the trilogy no longer applies given the revised statute and the contemporary jurisprudence, a preliminary question must be addressed: Ms. Miglin's argument that, given the particular facts at issue, it is possible for this Court to decide this appeal without determining whether the trilogy is still good law. Ms. Miglin applied for corollary relief pursuant to s. 15.2 of the 1985 Act before the expiry of the Consulting Agreement, which the courts below described as "thinly disguised spousal support". As a result, Ms. Miglin submits this is really a case "about the jurisdiction of the Court to award spousal support in the face of an existing spousal support agreement, not about an award of spousal support in the face of a full and final release". Ms. Miglin stresses that the Consulting Agreement, while time-limited, contained a renewal clause and in her view is thus properly construed not as a final agreement but rather as an agreement anticipating a review, variation or continuation of support. In Ms. Miglin's submission, then, the facts do not engage the trilogy, which was intended to apply only to "final agreement[s] entered into [by] the parties in order to settle the economic consequences of their divorce" (*Moge*, *supra*, at p. 839; see also *Pelech*, *supra*, at p. 849).

164 Even if Ms. Miglin is correct in her characterization of the Consulting Agreement, this argument adopts an unjustifiably narrow view of the parties' agreements. As I will outline in more detail below, the determination of an application for corollary relief under s. 15.2 in the face of an antecedent agreement between the parties requires an evaluation of the entirety of the parties' negotiated arrangement. In this case, the financial "package" that the parties negotiated consisted of both the Separation Agreement and the Consulting Agreement. The framework Separation Agreement contains a waiver of spousal support. At the same time, the Consulting Agreement referenced therein and attached as Schedule E thereto, whether or not it is properly understood as "thinly veiled spousal support", provides evidence of the parties' awareness and acknowledgment that Ms. Miglin would require a post-separation income. As Abella J.A. noted, the fact that it contained an open-ended renewal clause suggests that the parties understood that her need might continue past a five-year period.

165 The peculiar nature of the parties' agreements militates against adopting Ms. Miglin's approach of considering only the Consulting Agreement, to the exclusion of the Separation Agreement, as a way of avoiding the question of the trilogy's continued applicability. This Court must be attentive to the entirety of the parties' negotiated settlement, including the apparent inconsistences therein, namely, the coexistence of a support waiver based on a declaration of future self-sufficiency with a *de facto* support provision based on an acknowledgement of future need. With this backdrop in mind, I must now turn to the issue of whether the trilogy's threshold test for judicial intervention in final support agreements remains good law.

(3) The State of the Law: the Courts Below

166 The courts below each addressed the question of whether the trilogy applies on the facts of this case. Although he did not specifically reference the trilogy, the trial judge held that the threshold test of a radical change causally connected to the marriage did not apply under s. 15 of the 1985 Act. Instead, in his estimation, s. 15 requires the court to determine whether the separation agreement provides support to the dependent spouse in a fashion consistent with the social policies and objectives set out in s. 15(7) (now s. 15.2(6)). In reaching this conclusion, the trial judge declined to follow *Santosuosso v. Santosuosso* (1997), 32 O.R. (3d) 143 (Div. Ct.), a case that I will review in more detail below.

167 The Court of Appeal took a broader approach, characterizing the main issue in this case as "whether the threshold established in the *Pelech* trilogy survives [the] amendments and continues to apply under the new 1985 *Divorce Act*" (para. 2). After a comprehensive review of the 1985 Act and this Court's jurisprudence on spousal support, Abella J.A. answered this question in the negative, holding that the appropriate threshold test under s. 15.2 is whether there has been a material change in the parties' circumstances since the time the Agreement was made.

168 The differences between the approaches of the trial judge and the Court of Appeal reflect a much broader confusion among lower courts generally as to whether the trilogy's "radical change" and "causal connection" threshold test for judicial intervention in final spousal support agreements continues to be a valid one and, if not, what threshold test now applies. This confusion underscores the importance of approaching the question of the trilogy's continued viability directly and definitively. This is a step which to date this Court has not taken, despite reconceptualizing the nature and purpose of spousal support based on the 1985 Act in cases such as *Moge* and *Bracklow* (the exception is the minority judgment of L'Heureux-Dubé J. in *G. (L.) v. B. (G.)*, *supra*, which I will discuss in more detail later in these reasons). This area of the law cannot remain in this state of turmoil. Guidance is needed if trial courts are to be able to evaluate, and family law practitioners are to be able to draft, support agreements with any degree of coherence and consistency.

169 Shaffer and Melamed, in their article "Separation Agreements Post-*Moge*, *Willick* and *L.G. v. G.B.*: A New Trilogy?", *supra*, provide an overview of the range of judicial views on the treatment of final settlement agreements, followed by a detailed appendix outlining the holdings in 75 cases across the common-law provinces. The Alberta Court of Queen's Bench in *Wilkinson v. Wilkinson* (1998), 43 R.F.L. (4th) 258, at pp. 270-71, groups the various approaches to the trilogy that Shaffer and Melamed identify into four main categories (see also J. D. Payne and M. A. Payne, *Canadian Family Law* (2001), at pp. 215-16):

1. cases in which courts strictly apply the *Pelech* standard, requiring a radical change causally connected to the marriage before intervening in settlement agreements;

2. cases in which courts purport to apply the *Pelech* standard, but in fact apply a standard that is less stringent;

3. cases in which courts explicitly reject the trilogy standard in favour of some other variation standard, for instance applying a lower threshold such as material or substantial change or endorsing the minority opinion in *G. (L.) v. B. (G.)*, *supra*, and determining whether to intervene in an agreement by having regard to the extent to which it meets the objectives in s. 15.2 of the *Divorce Act*; and

4. cases in which courts have shown an increased willingness to adopt a broad definition of change, defining for instance as a "change" the parties' failed expectations where the dependent spouse does not achieve the predicted economic self-sufficiency.

The consequence of this wide variation in approaches is that similarly situated individuals seeking corollary relief pursuant to s. 15.2 in the face of antecedent agreements are subjected to vastly different treatment by courts.

170 To the extent that Shaffer and Melamed are able to identify a trend in this area of the law, they note that "the trilogy has been abandoned in an astonishing number of cases" (p. 61), although this has not been uniform across the country. I would add to this my sense that, even where courts do apply the trilogy they are increasingly unlikely to do so unselfconsciously, particularly when they reach the conclusion that the trilogy's strict threshold test is not met on the facts. In *Wilkinson*, for instance, even though the court treated the case as an application for a variation of a time-limited support order under s. 17(10) (a provision that, in contrast to s. 15.2, does codify a change-based causal connection threshold test) and emphasized contract law principles, it applied *Pelech* only after providing a thorough review of the conflicting judicial approaches to the question of the continued validity of the trilogy.

171 A similar trend was observed in Quebec by academic comment. It appears that, soon after the trilogy, Quebec courts began to adopt a broader and more flexible view of the diversity of the models of marriage, of the grounds for support and of causation issues. At the same time, Quebec courts seem to have felt constrained in the development of new and more flexible approaches to the application of the 1985 Act by lingering doubts about the status of the trilogy and its precedential value particularly since *Moge*, *supra*, especially when they had to review separation agreements (see, for example, D. Goubau, "La situation depuis la trilogie *Pelech*", in *Droit de la famille québécois* (loose-leaf), vol. 2, at pp. 6019-25; D. Goubau, "Une nouvelle ère pour la pension alimentaire entre ex-conjoints au Canada" (1993), 72 *Can. Bar Rev.* 279; *Droit de la famille — 1404*, [1991] R.J.Q. 1561 (C.A.); *Droit de la famille — 1567*, [1992] R.J.Q. 931 (C.A.); *Droit de la famille — 1688*, [1992] R.J.Q. 2797 (C.A.); *Droit de la famille — 2249*, [1995] R.J.Q. 2066 (C.A.); *Droit de la famille — 2325*, [1996] R.J.Q. 34 (C.A.); *Droit de la famille — 2537*, [1996] R.D.F. 735 (C.A.); and *D.V. v. J.A.F.*, [2002] R.J.Q. 1309 (C.A.)).

172 It is interesting to note in this regard that Mr. Miglin himself, perhaps in recognition of these trends, has essentially abandoned the argument that he appears to have advanced in the courts below — that the Separation Agreement indeed triggered the application of the trilogy and that he was insulated from a claim for spousal support because there was no radical and unforeseen change in circumstances causally connected to the marriage. In his pleadings before this Court, he stated that "in view of the legitimate controversy the trilogy invoked, its application is no longer tenable", although he was careful to observe that it nonetheless remained open to this Court to affirm the trilogy.

173 In my view, the lower court cases of particular interest in this context are those in which the court either purports to apply the trilogy but in fact applies a standard that is less stringent, or applies the trilogy standard only reluctantly. These types of cases, and the commentary that they have generated, provide an indication of what makes courts wary of applying the trilogy and thus what is truly at stake in the debate over whether the trilogy should be rejected or reaffirmed.

174 Two cases are instructive here by way of example. First is the much discussed decision of the Ontario Divisional Court in *Santosuosso*, *supra*. In *Santosuosso*, the parties had entered into a Separation Agreement after a 23-year traditional marriage, in which spousal support was to terminate after two years. The Agreement contained a full waiver and release of all further support even in the face of a catastrophic change in circumstances. After the time-limited support terminated under the Agreement, the wife applied for spousal support pursuant to s. 15 of the Act. She argued that, at the time the Agreement was negotiated, the parties had expected that she would become economically self-sufficient, but that these expectations were not realized. At the time she applied for corollary relief, she had not successfully completed upgrading courses or secured full-time employment. She was working 60 hours a week at low-paying jobs, earning $1,700 monthly. The Divisional Court found that Ms. Santosuosso had suffered a radical, unforeseen change in circumstances that was related to a pattern of economic dependency created in the marriage, concluding, at p. 156, that:

> It was not within the contemplation or expectation or reasonable anticipation of *both parties* to the agreement that the applicant would be working almost 60 hours a week at low-level wages to earn $1,700 a month in 1996. Further, an underpinning of the agreement was that the wife would achieve what can be fairly characterized as a modest and realistic goal for financial independence having regard to her circumstances. [Emphasis in original.]

175 Critics of the decision have suggested that the court in *Santosuosso*, although paying lip service to the trilogy, applied a considerably less stringent threshold for variation: see, for example, S. M. Grant, "The End of Finality" (1997), 27 R.F.L. (4th) 252. According to Shaffer and Melamed, *supra*, at p. 66:

> It is hard to buy the court's conclusion that Mrs. Santosuosso's circumstances were truly a radical and unforeseen change as contemplated by the trilogy. One might argue that a more plausible interpretation of what was going on in the case was a refusal of the court to defer to the contract *not* because it fell within the exception carved out by the trilogy, but because it did not accord with the court's sense of fairness. As a result, some commentators have decried the decision in *Santosuosso* as heralding the end to the finality of separation agreements. [Emphasis in original.]

> (See also N. Bala and K. Chapman, "Separation Agreements & Contract Law: From the Trilogy to *Miglin*", in *Child & Spousal Support Revisited* (2002), tab 1, at pp. 1-26 and 1-27.)

176 The tension identified here between finality and fairness also surfaces, albeit in a different manner, in *Leopold v. Leopold* (2000), 12 R.F.L. (5th) 118. In *Leopold*, the Ontario Superior Court of Justice refused to vary a time-limited support agreement containing a full and final release where the husband sought renewed support. The parties had been married for seven years and had two surviving children. At the time of the marriage, the husband was earning $20,000 per year and had a small net worth of $1,400, while the wife was the beneficiary of a significant family trust. At separation, the wife's various interests were valued in excess of $4 million. The husband's employability was circumscribed throughout the marriage by health problems which continued after separation. When the parties separated, they entered into agreements whereby the husband received an equalization payment of $205,000 and spousal support in the amount of $1,700 per month for 42 months. After the time-limited support had expired, the husband applied for spousal support under s. 15.2 of the 1985 Act. He cited two factors that in his view should trigger renewed support: the fact that his business plans had not been successful and that the parties' eldest child, who had behavioural and health problems, had begun to live with him. Wilson J. applied *Pelech* and denied support, finding that these events did not constitute a radical, unforeseen change in circumstances causally connected to the marriage.

177 Although she applied *Pelech*, Wilson J. also sought to strike a balance between the "important competing objectives of certainty and fairness" (*Leopold*, *supra*, at para. 98). To this end, she devoted considerable effort in her reasons to outlining a less restrictive definition of common-law unconscionability that would fit the unique dynamics of family law, although she ultimately concluded that the agreement in question did not meet even this more relaxed standard. From Wilson J.'s perspective, an unconscionable agreement in the family law context is an agreement that is outside of the range of what is objectively fair at the time it is entered into. As she outlined at paras. 141 and 143-44:

> . . . in the family law context, the parameters of a strict test of unconscionability begin to blur. I conclude that the traditional dual test defining what is unconscionable requiring both inequality and improvidence rooted in the common law ignores the special nature of marital relationships. A rigid application of the inequality requirement ignores the reality that these are not commercial contracts negotiated for commercial gain in emotionally neutral circumstances.
>
> . . .
>
> I agree with the suggestion of McLeod in his annotation to *B. (G.)*, *supra*, at p. 216 that a court should only intervene if the terms of the settlement are outside the generous ambit within which reasonable disagreement is possible.
>
> I conclude, therefore, that an unconscionable agreement is one that is clearly outside the range of what is objectively fair when it was made, taking into account the facts and circumstances of the parties. If it is clearly outside the range within which rational people may disagree, then inevitably the statutory objectives of the 1985 *Divorce Act* will not have been met. [Emphasis added.]

178 Although she rejected the routine imposition of "judicial concepts of fairness" in the face of existing agreements, Wilson J. suggested that this revised and more flexible notion of unconscionability should serve as a caveat to the trilogy's strict threshold test (paras. 142 and 146(4)). In her view, this is appropriate in part because, in the trilogy itself, the threshold test for judicial intervention in a final agreement was subject to the reservation that the agreement not be "unconscionable in the substantive law sense" (see *Richardson*, *supra*, at p. 872).

179 The role that Wilson J. crafts for unconscionability in *Leopold* in fact represents a significant shift from the role accorded to the stricter common-law doctrine by Wilson J. in the trilogy. As J. G. McLeod comments in the Annotation to *Leopold v. Leopold* (2000), 12 R.F.L. (5th) 120, at pp. 124-25:

> Wilson J. wanted to reduce the threshold to override the support provisions of a final support agreement but had a difficult time implementing such a test on the current state of the law. Her description of many wives' circumstances at the time of marriage breakdown and during negotiations accurately reflects the problems facing a lawyer representing a dependent client. She was probably correct when she stated that traditional rules of law were inadequate to ensure that fair support bargains are reached. If courts cannot control the validity rules to ensure that only fair bargains are upheld, they may be able to accomplish the same end by expanding the range of cases where a court can override the support provisions of a valid agreement.
>
> When Wilson J. raised the concept of unconscionability as a limiting factor on upholding settlement agreements in the trilogy, she was referring to a flaw in the formation of a contract, not to a test to override a domestic contract. In *Leopold*, Wilson J. seems to treat "unconscionability" as a potential threshold test to override a valid support agreement. [Emphasis added.]

180 I will further explore the doctrine of unconscionability, as well as the relative merits of Wilson J.'s approach, later in these reasons. I find *Leopold* of interest at this stage of the analysis because it provides a clear example of the trend noted in *Wilkinson*, *supra*, at para. 49: "[i]n essence, the courts are looking for ways to circumvent the strict standard imposed by *Pelech* in order to ensure a fair result". The impetus to do so — to tip the balance away from finality and towards fairness where these goals appear incompatible on the facts of a given case — is in keeping with the significant shift that has taken place in both the statutory framework and the family law jurisprudence of this Court since the trilogy was decided more than 15 years ago.

181 It is also in keeping with a broader and more realistic understanding of the operation of contractual relationships that has emerged in both academic literature and case law in recent years, discrediting earlier, more abstract or formalistic notions of contract law (see Bala and Chapman, *supra*, at pp. 1-13 to 1-20). A legal scholar, Professor J.-G. Belley, for instance, has concluded from his extensive fieldwork that parties use commercial contracts primarily as a framework for ongoing cooperation, rather than as a conflict resolution tool for allocating gains and losses in the event of a litigated dispute between the parties (see *Le contrat entre droit, économie et société: Étude sociojuridique des achats d'Alcan au Saguenay-Lac-Saint-Jean* (1998)). As Belley outlines, over the long term, commercial contracts are voluntarily adjusted by the parties, because the parties prioritize preserving their contractual relationship (see also L. M. Friedman, *American Law in the 20th Century* (2002), at p. 385). They thus work towards mutual accommodation, rather than resorting to judicial

intervention to resolve conflicts when they arise. The emphasis is placed on adapting and maintaining the relationship, rather than on one party or the other triumphing in a court battle. The contract structures and facilitates continuous cooperation between the parties. In other words, in practice parties prefer to keep their commercial contracts flexible and adaptable, rather than seeking rigid enforcement through judicial institutions.

182 It is thus important to recognize that, while separation agreements are indeed unique as I will discuss in more detail below, even in commercial law settings contracts are not designed to be, nor are they understood as, unalterable. We must resist the temptation to reify or mythologize the "sanctity" or "finality" of contract, particularly in the field of family law, which primarily concerns the management of human relationships at some of their most sensitive points. That Parliament has resisted this temptation in the family law context is evident in the fact that, in the 1985 Act, separation agreements are recognized as but one of the factors to be taken into account in applications for corollary relief under s. 15.2. It is to a discussion of this statutory framework, as well as the contemporary spousal support jurisprudence of this Court, that I now turn.

(4) The Current Statutory and Jurisprudential Context

183 Both the 1985 Act itself and this Court's recent family law jurisprudence dictate that a case-by-case evaluation of fairness and compatibility with the statutory objectives — not an axiomatic insistence on finality — must guide courts in applications for corollary relief under s. 15.2, even in the face of an existing separation agreement.

(i) *The Statute*

184 As McLachlin J. (as she then was) stated in *Moge*, spousal support is, "first and last, a [matter] of statutory interpretation. . . . [I]n the end the judge must return to what Parliament has said on the subject" (p. 877). What Parliament had to say in the 1968 Act, under which the trilogy was decided, differs markedly from what it had to say in the 1985 Act.

185 Under the 1968 statutory framework, the "means and needs" test was the exclusive criterion for support. The 1968 Act provided that:

11. (1) Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just

to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:

(*a*) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of

(i) the wife,

(ii) the children of the marriage, or

(iii) the wife and the children of the marriage;

(*b*) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of

(i) the husband,

(ii) the children of the marriage, or

(iii) the husband and the children of the marriage; and

(*c*) an order providing for the custody, care and upbringing of the children of the marriage.

(2) An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them.

186 The 1968 Act was silent on the question of support objectives. However, as L'Heureux-Dubé J. outlined in *G. (L.) v. B. (G.)*, *supra*, "[w]hat was not spelled out in the 1968 Act was quickly made up by the courts", which adopted the clean break theory of support, assuming that the "economic self-sufficiency of either spouse could and should be achieved as soon as possible after the divorce" (para. 22). As I noted above, the trilogy, in establishing a strict threshold test for judicial intervention in separation agreements, both reflected and promoted this approach.

187 In 1985, Parliament replaced what Abella J.A. termed the "linguistic and conceptual minimalism" of s. 11 of the former *Divorce Act* with a "comprehensive scheme for support" (paras. 60-61). For ease of reference, I reproduce the relevant spousal support provisions of the 1985 Act here:

> **15.2** (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.
>
> . . .
>
> (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (*a*) the length of time the spouses cohabited;
>
> (*b*) the functions performed by each spouse during cohabitation; and
>
> (*c*) any order, agreement or arrangement relating to support of either spouse.
>
> . . .
>
> (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

(*a*) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(*b*) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(*c*) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(*d*) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

188 While I express no opinion on whether the trilogy's stringent threshold test was truly organic to the 1968 Act, a plain reading of the 1985 Act reveals that neither the trilogy's strict threshold, nor the values upon which it is grounded, have survived. The creation of a fundamentally different statutory environment is evidenced by two aspects of the 1985 Act that were entirely absent from the earlier Act and that are inconsistent with the trilogy: (1) the articulation in s. 15.2(6) of four specific spousal support objectives and (2) the inclusion of separation agreements in s. 15.2(4) as one of the factors relevant to the exercise of judicial discretion in an application for corollary relief.

189 These provisions require courts to engage in a more nuanced analysis than that required under the 1968 Act when considering a question of support and the basis for it. The starting point for this analysis, whether or not an agreement is in issue, is the objectives for spousal support articulated in s. 15.2(6): recognizing the economic advantages or disadvantages arising from the marriage or its breakdown; apportioning the financial consequences of childcare; relieving economic hardship arising from the breakdown of the marriage; and promoting, in so far as practicable, the economic self-sufficiency of the spouses within a reasonable period of time. The structure of s. 15.2(6) dictates, as this Court has repeatedly emphasized, that "[n]o single objective is paramount; all must be borne in mind" (*Moge*, *supra*, at p. 852; *Bracklow*, *supra*, at para. 35). The statute does not support the position that a final agreement relieves the court of the obligation to apply all four of the objectives of spousal support in an application for corollary relief under s. 15.2. The effect of the trilogy's strict threshold for judicial intervention is the "almost automatic" adoption of the terms of an agreement. This prevents the court from being attentive to, and in many cases defeats, one or more of Parliament's specified objectives (see the comments of Misener L.J.S.C. in *Corkum v. Corkum* (1988), 14 R.F.L. (3d) 275 (Ont. H.C.), at p. 286). The trilogy's requirement of a radical and unforeseen change in circumstances that is causally connected to the marriage is thus fundamentally incompatible with the requirements of s. 15.2(6) of the governing statute.

190 More broadly, s. 15.2(6) significantly qualifies the role of one of the key philosophies underlying the trilogy's strict threshold: that parties should be required to achieve self-sufficiency quickly and permanently in order to facilitate a clean break. While self-sufficiency is referenced in s. 15.2(6), it is only one of four objectives. The very language of the 1985 Act precludes courts from granting self-sufficiency the pre-eminence it is accorded in the trilogy. This is particularly so given that self-sufficiency is the only qualified objective in s. 15.2(6) ("in so far as practicable"), which means that continuing need is an ongoing concern and not one that in the opinion of Parliament ends at the time of the separation or is always to be determined at that time. The court, in other words, must be closely attuned to what may be ongoing difficulties flowing from the breakup of the marriage relationship. Moreover, under s. 15.2, even where economic self-sufficiency has been attained, this will not necessarily dispose of a support application (see *Moge*, *supra*, at p. 852). In determining the right to, and the quantum and duration of spousal support, the court must also have regard, for instance, to the objectives of recognizing the economic advantages or disadvantages arising from the marriage or its breakdown and apportioning the financial burden of childcare.

191 The fact that the 1985 Act mandates a flexible and contextual approach to spousal support is underscored by the Act's treatment of support agreements themselves. The 1985 Act, in contrast to the 1968 Act, makes specific reference to agreements, including them in s. 15.2(4) among the factors a court must consider in determining whether to order spousal support. In this sense, as McLachlin J. noted in *Bracklow*, *supra*, in the 1985 Act "[c]ontractual support obligations, while not new, were given new emphasis" (para. 18). The extent of this emphasis, however, is limited by the structure of s. 15.2(4) itself. While agreements are enumerated as one factor to be taken into account in spousal support applications, they are not to be accorded primacy. Given this statutory framework, it is inappropriate to continue to apply the trilogy's radical change and causal connection test, the effect of which is to render the agreement the decisive factor in all but the most exceptional circumstances.

192 In *Richardson*, *supra*, La Forest J. argued against allowing separation agreements the kind of compelling weight the majority in effect accorded them by limiting judges' discretion to vary agreements to those cases where radical or catastrophic changes have occurred since the agreement was made. He stated, at pp. 883-84:

> Even if I thought that the adoption of such a judicial policy would have the desired effect, I do not think we are given the power to do this at the expense of those whom Parliament sought to protect by giving jurisdiction to a judge to order what he or she thinks is "fit and just" having regard to the factors spelled out in the legislation. Parliament's policy, as Chouinard J. noted, is one of "intentional flexibility" aimed at meeting the variegated situations a trial judge must face in divorce matters. I am confident that trial judges are in a better situation to respond to this policy than appeal court judges; trial judges hear the matter first hand. Parliament obviously took this view in vesting the discretion in them. Theirs is the task of making the decision, weighing the factors prescribed by the Act. Courts of appeal undoubtedly have a role within the limits previously described, in seeing

> that trial judges properly exercise their discretion by adequately weighing the factors they are required to consider, but the search for precision must be confined within the intentionally flexible policy adopted by Parliament. There is no flexibility in a judicially created policy that requires a judge to exercise his or her discretion to do what is fit and just in accordance with the provisions of a separation agreement unless radical changes have occurred since the agreement was made. Under such a policy, the judge's discretion simply becomes no more than one to vary a separation agreement when subsequent radical circumstances have occurred. This, in my view, amounts to rewriting the Act. This we have no right to do. [Emphasis added.]

193 La Forest J. did not carry the day with this view in *Richardson*, but his words have enhanced meaning under the 1985 statutory framework. While the 1968 Act was silent on the matter, the 1985 Act specifically entrenches a flexible approach to agreements by defining them as but one factor to consider on an application for support. A plain reading of the statute does not support the view than an agreement can either be unduly privileged over the other factors enumerated in s. 15.2(4), or considered independently from the court's broader analysis of the support objectives codified in s. 15.2(6). There is thus a fundamental disconnect between the current statutory framework and the trilogy's approach in treating an agreement as a "virtually binding force unless radical changes have since occurred" (*Richardson*, p. 884).

194 As I will discuss in more detail later in these reasons, what flows naturally from the language of the 1985 Act is an approach that requires the court to evaluate the parties' agreement at the time of the application for corollary relief to see if it meets the objectives for spousal support enumerated in s. 15.2(6). The degree to which the agreement realizes these objectives in light of all of the parties' circumstances at the time of the application will be the determining factor in according it finality.

(ii) *The Case Law*

195 The conclusion I have reached based on a plain reading of the 1985 Act — that neither the trilogy's strict threshold test for judicial intervention in a support agreement nor the underlying values on which it is based have survived — is fully supported by the recent jurisprudence of this Court. The contemporary framework cases on spousal support, *Moge* and *Bracklow*, do not directly address the continued validity of the trilogy's threshold test for judicial intervention in the spousal support provisions of a final agreement. However, both espouse a contextual approach to spousal support that is fundamentally inconsistent with the emphasis on absolute autonomy, formal equality, and deemed self-

sufficiency that grounded the trilogy's privileging of finality, even at the expense of fairness. This contextual approach reflects the varied models of marriage and is sensitive to the difficulties inherent in unbundling a marital relationship. It is also grounded in a broader notion of causation which seeks to fully address the consequences of the marriage as time and circumstances unfold in respect of the need for support.

196 At the heart of L'Heureux-Dubé J.'s analysis of the rationales for spousal support in *Moge* is the statutory imperative that I outlined above: in determining the entitlement to and the quantum of support, the Court's starting point must be all four of the objectives outlined in s. 15.2(6) of the 1985 Act. Citing *Payne on Divorce* (2nd ed. 1988), at p. 101, L'Heureux-Dubé J. noted that the diversity of these objectives reflects Parliament's recognition that the "economic variables of marriage breakdown and divorce do not lend themselves to the application of any single objective" (*Moge*, *supra*, at p. 851 (emphasis added by L'Heureux-Dubé J.)). More particularly, she noted that there is no statutory basis for granting pre-eminence to the objective of self-sufficiency. Instead, taken together, the 1985 Act's spousal support objectives demand a broader approach. These objectives, each of which is predicated on the philosophy of marriage as a socio-economic partnership, "can be viewed as an attempt to achieve an equitable sharing of the economic consequences of marriage or marriage breakdown" (*Moge*, at p. 866).

197 In *Moge*, L'Heureux-Dubé J. stressed not only statutory language (i.e., the diversity of support objectives) but also social policy in concluding that Parliament in the 1985 Act intended to move away from deemed self-sufficiency and towards what has come to be known as the compensatory model of spousal support. In relation to the social context in which support orders are made, she stated, at pp. 853 and 857:

> In Canada, the feminization of poverty is an entrenched social phenomenon. . . .
>
> It would be perverse in the extreme to assume that Parliament's intention in enacting the Act was to financially penalize women in this country. And, while it would undeniably be simplistic to identify the deemed self-sufficiency model of spousal support as the sole cause of the female decline into poverty, based on the review of the jurisprudence and statistical data set out in these reasons, it is clear that the model has disenfranchised many women in the court room and countless others who may simply have decided not to request support in anticipation of their remote chances of success. The theory, therefore, at a minimum, is contributing to the problem.

198 The "ethos of deemed self-sufficiency", which allows for the creation of a clean break

between spouses whether or not the conditions of self-sufficiency for the dependent spouse have in fact been met, fails to recognize the lived reality of many women both during a marriage and after its breakdown (*Moge*, at p. 853; see also Bailey, *supra*, at p. 633). As L'Heureux-Dubé J. explained, the disadvantages flowing from marriage and its breakdown tend to fall disproportionately on women because of the roles that they frequently assume during the relationship (particularly, but not exclusively, in longer term marriages or marriages involving children). Disadvantages such as time out of the work force or foregoing educational and training opportunities may irreparably and permanently affect women's prospects for self-sufficiency and render short-term, "sink or swim" support inadequate.

199 L'Heureux-Dubé J.'s emphasis on social context in *Moge* contrasts sharply with Wilson J.'s reluctance in the trilogy to acknowledge systemic gender inequality in establishing the threshold for judicial intervention in spousal support agreements. L'Heureux-Dubé J.'s approach, though not formulated specifically in relation to spousal support agreements, is more in keeping with La Forest J.'s dissent in *Richardson*, in which he insisted that it was "not paternalism, but realism" (p. 877) to recognize continuing disparities along gender lines in spouses' bargaining power and ability to become economically self-sufficient following marriage breakdown. L'Heureux-Dubé J. noted in *Moge*, that while "there will be the occasional marriage where both spouses . . . either mak[e] no economic sacrifices for the other or, more likely, mak[e] them equally", such cases "would appear to be rare". In these "utopian scenario[s]", the former spouses may be able to make a clean break and proceed with their respective lives, but in a majority of cases the marriage will have involved economic sacrifices by one spouse, typically the wife, and corresponding economic benefits to the other (pp. 864-65). The logic of compensatory support requires that these respective roles be reflected in the spousal support arrangement (at p. 864):

> The doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown upon its dissolution which, in my view, the Act promotes, seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse. Significantly, it recognizes that work within the home has undeniable value and transforms the notion of equality from the rhetorical status to which it was relegated under a deemed self-sufficiency model, to a substantive imperative.

200 The fundamental incompatibility between the trilogy and *Moge* lies, in large part, in this shift away from an insistence on formal equality towards a recognition of the substantive equality of the spouses in the marriage and at the time of the separation. Having regard to Parliament's goal of equitably apportioning the economic consequences of the marriage and its breakdown requires courts, in awarding spousal support, to address in a realistic and practical manner the consequences of the parties' relationship and its breakup.

201 *Moge*'s movement away from the "clean break" model is also reflected in L'Heureux-

Dubé J.'s recognition that the objectives of support enumerated in the 1985 Act encompass non-compensatory, as well as compensatory, considerations (p. 865). This idea emerges as the central theme of *Bracklow*. In *Bracklow*, McLachlin J. reasoned that, even in the absence of a contractual or compensatory foundation, spouses may have support obligations where their former partners have need and they have the capacity to pay. In reaching this conclusion, McLachlin J. found that the direction in s. 15.2(4) that the judge consider the "condition, means, needs and other circumstances of each spouse" invites "an inquiry that goes beyond compensation to the actual situation of the parties at the time of the application" (para. 40). Similarly, two of the objectives in s. 15.2(6) — relieving economic hardship arising from the breakdown of the marriage and promoting economic self-sufficiency to the extent practicable — are sufficiently broad to encompass non-compensatory support (paras. 41-42).

202 At the root of *Bracklow* is the recognition that marriage may create a complex web of interdependencies that are not always appropriately addressed by the clean break model of marriage and support, which stresses the parties' independence. An alternate model, which in McLachlin J.'s view is reflected in ss. 15.2(4) and 15.2(6) of the statute, is that of "mutual obligation", which takes a somewhat broader view of the expectations and obligations that flow from marriage. As this Court recently stated in *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83: "people who marry can be said to freely accept mutual rights and obligations" (*per* Bastarache J., at para. 55). The mutual obligation model conceptualizes marriage as an "economic partnership . . . built upon a premise (albeit rebuttable) of mutual support" and recognizes that it is artificial to assume "that all separating couples can move cleanly from the mutual support status of marriage to the absolute independence status of single life" (*Bracklow*, at paras. 32 and 31). As McLachlin J. stated, "it is . . important to recognize that sometimes the goals of actual independence are impeded by patterns of marital dependence, that too often self-sufficiency at the time of marriage termination is an impossible aspiration" (para. 32). Where this is the case, and where compensatory support is not indicated, a party with the ability to pay may have an obligation based in the marriage relationship itself to continue to meet or contribute to the needs of a former spouse after the break. Realizing the goal of dealing equitably with the economic consequences of marriage breakdown in certain circumstances may require no less.

203 McLachlin J.'s contextual approach to the marital relationship in *Bracklow* stands in vivid contrast to Wilson J.'s more narrow approach in the trilogy. By way of example, McLachlin J.'s conclusion that in certain circumstances a potentially lifelong support obligation — there are, as she says, "no magical cut-off dates" (para. 57) — may arise out of the marriage relationship conflicts with Wilson J.'s view in *Pelech* that "to burden the respondent with [Mrs. Pelech's] care fifteen years after their marriage has ended for no other reason than that they were once husband and wife seems to me to create a fiction of marital responsibility at the expense of individual responsibility" (*Pelech*, *supra*, at p. 852). Similar discord flows from McLachlin J.'s finding that the former spouse, rather than the state, is in many circumstances the appropriate ultimate provider of non-compensatory support where a needy partner cannot attain post-marital self-sufficiency. By contrast, Wilson J. held that where a former spouse seeking corollary relief in the face of an existing agreement cannot establish that he or she has "suffered a radical change in circumstances flowing from an economic pattern of dependency engendered by the marriage . . . the obligation to support the former spouse should be, as in the case of any other citizen, the communal responsibility of the state" (*Pelech*, at pp. 851-52). For McLachlin J., the approach is broad and contextual: "the desirability of freedom to move on to new relationships is merely one of several objectives that might guide the judge" (*Bracklow*, at para. 57). For Wilson J., the

clean break is paramount: "[The parties] made the decision to marry and they made the decision to terminate their marriage. Their decisions should be respected. They should thereafter be free to make new lives for themselves without an ongoing contingent liability for future misfortunes which may befall the other" (*Pelech*, at p. 851).

204 *Bracklow*, like *Moge*, thus emphasizes a more holistic and fact-based approach to spousal support, in keeping with the diversity of factors and objectives in the 1985 Act. The recognition in *Moge* and *Bracklow* that the relationship of marriage often creates complicated and gender-based interdependencies that cannot adequately be addressed by stressing formal equality or deemed self-sufficiency is incompatible with the mantra of individualism that underscores the trilogy: individual choice, individual responsibility, and individual autonomy. *Moge* and *Bracklow* provide compelling support for the proposition that it is inappropriate to defer to a support agreement based on unrealistic assumptions about the absolute autonomy or deemed self-sufficiency of the parties. The paradigm shift evident in this Court's jurisprudence on the rationales for spousal support bolsters the conclusion that I reached above based on a plain reading of the statute: the trilogy's radical change and causal connection threshold test for judicial intervention in "final" agreements can no longer stand.

205 To be consistent with the developments in this Court's jurisprudence, the threshold test that replaces it must be one that insists on the substantive equality of the parties during the marriage and at the time of separation, by ensuring that the agreement equitably apportions the economic consequences of the marriage and its breakdown. Before turning to a discussion of the contours of such a test, I think it appropriate to make some prefatory comments about the nature of separation and support agreements themselves.

B. *The Unique Nature of Separation and Spousal Support Agreements*

206 Separation and support agreements aim to disentangle complex relationships and interdependencies. As Bala and Chapman, *supra*, comment, separation agreements are "uniquely significant" contracts that have a "profound and personal effect" on the individuals who enter into them (p. 1-2). Nevertheless, some commentators suggest that contract law principles would provide an adequate means of redressing any injustices that may arise between parties to such agreements (see M. Menear, "*Miglin v. Miglin* — Judicial Assault on Individual Liberty" (2002), 20 *C.F.L.Q.* 119). I disagree.

207 As I outlined above, in *Moge* and *Bracklow*, this Court emphasized the importance of a contextual approach to spousal support, which not only respects the diversity of marital relationships, but also recognizes the social and socio-economic realities that shape parties' roles within these relationships and upon marital breakdown. The private contractual model is blind to these realities and is therefore fundamentally incompatible both with the contextual approach to spousal support

propounded by this Court and with the language of the 1985 Act.

208 Under the private contractual model, contracts may only be set aside if they are unconscionable in that they shock the conscience of the court. For a contract to be deemed unconscionable, there must be both a substantial inequality of bargaining power between the parties that is exploited by the stronger party who preys upon the weaker and substantial unfairness or improvidence in the terms of the agreement (see Bala and Chapman, *supra*, at pp. 1-7 and 1-8; *Mundinger v. Mundinger* (1968), 3 D.L.R. (3d) 338 (Ont. C.A.), aff'd (1970), 14 D.L.R. (3d) 256n (S.C.C.)). The stringency of the test for unconscionability reflects the strong presumption that individuals act rationally, autonomously and in their own best interests when they form private agreements. Non-enforcement of the parties' bargain is only justified where the transaction is so distorted by unequal bargaining power that this presumption is displaced. It is inherently problematic to apply this strict standard, which is more appropriate to arm's-length commercial transactions, in the polar opposite negotiating context of family separation and divorce.

209 The effect of the private contractual model generally, and the doctrine of unconscionability more specifically, is to preclude any recognition of the unique context in which separation agreements are made and the special circumstances that they are intended to govern. Separation agreements are often negotiated in situations that are emotionally charged. Their negotiation may be further complicated by what are typically gender-based inequities in bargaining positions between the parties. In addition, separation agreements are inherently prospective in nature and, as family law experts stress, the parties may have difficulty accurately forecasting how the economic consequences of their marriage and its breakdown will play out over time. See M. Shaffer and C. Rogerson, "Contracting Spousal Support: Thinking Through *Miglin*" (2003), 21 *C.F.L.Q.* 49 (paper originally presented to the National Family Law Program (Kelowna, B.C., July 14-18, 2002), at pp. 67-71; Bala and Chapman, *supra*, at pp. 1-32 to 1-35.

210 In cases of marriage breakdown, it is not appropriate to require that circumstances rise to the level of unconscionability before parties' agreements will be reopened. Settlement agreements are formed in an environment where the assumptions underpinning the enforceability of freely chosen bargains do not apply to the same extent as in the commercial context. This was Wilson J.'s concern in *Leopold*, where she stressed that settlement agreements are negotiated in a unique emotional climate, involving much more subtle bargaining inequalities than are at play in a commercial context (see also J. G. McLeod, Annotation to *B. (G). v. G. (L.)* (1995), 15 R.F.L. (4th) 216, at p. 219). I share Wilson J.'s concerns in this respect, although I disagree with her conclusion, and that of the majority in this case, that the solution to this problem lies, in part, in revising the common-law doctrine of unconscionability itself.

211 In my view, one does not need to entertain a heavy-handed or paternalistic view of the propriety of judicial intervention to "save people from themselves" in order to express scepticism about

the background negotiating conditions for separation agreements and about whether, in light of these conditions, waivers of support can always be taken at face value. As La Forest J. observed in dissent in *Richardson*, *supra*, in the stressful circumstances of divorce "many people . . . do very unwise things, things that are anything but mature and sensible, even when they consult legal counsel" (p. 883). J. D. Payne and M. A. Payne echo the conclusion that optimal bargaining is unlikely to take place in the negotiation of settlement agreements in *Dealing with Family Law: A Canadian Guide* (1993), at p. 78:

> In the typical divorce scenario, spouses negotiate a settlement, often with the aid of lawyers, at a time when they are still experiencing the emotional trauma of marriage breakdown. Spouses who have not come to terms with the death of their marriage and who feel guilty, depressed or angry in consequence of the marriage breakdown are ill-equipped to form decisions of a permanent and legally binding nature.

One possible effect of this emotionally charged negotiating environment is that spouses may seek to end things quickly and finally and may fail to assess the long-term impact of the breakup. The rush to be free of the relationship may significantly impede the process of weighing and balancing the economic advantages and disadvantages flowing from the marriage and its breakdown and ensuring that these advantages and disadvantages are accurately reflected in the support agreement.

212 In addition to the inherent emotional stress of separation and divorce, inequalities in bargaining power rooted in the nature of the parties' marital relationship may also have a negative impact on the negotiation of settlement agreements, as Shaffer and Rogerson suggest at p. 70. Subtle pressures may be at work even where the parties have negotiated over a long period of time, and even where there is proof they both received independent legal advice. Well-established patterns governing a couple's interaction may continue to manifest themselves during the negotiating process. For instance, a spouse who depended on and deferred to his or her partner throughout the marriage may continue to do so at the bargaining table. Alternatively, a legacy of abuse may continue to colour the parties' interactions as they work out the details of a support agreement. See Shaffer and Rogerson, *supra*, at p. 70; McLeod, Annotation to *B. (G). v. G. (L.)*, *supra*, at pp. 218-19; G. Stotland and M. R. Siminovitch, "Renunciation to Spousal Support — The Great Escape" (1996-97), 14 *C.F.L.Q.* 159, at p. 166; M. Neave, "Resolving the Dilemma of Difference: A Critique of 'The Role of Private Ordering in Family Law'" (1994), 44 *U.T.L.J.* 97, at pp. 125-26.

> 213 In some situations, it may ultimately be such power dynamics that determine the content of an agreement, rather than an objective assessment of how best to equitably distribute the economic consequences of the marriage and its breakdown. C. Martin notes that there is some evidence to suggest that support claimants receive less through negotiation than might be ordered by the courts. Martin sees this evidence as reflective of the fact that support claimants are systematically disadvantaged in the negotiating process (see "Unequal Shadows: Negotiation Theory and Spousal Support Under Canadian Divorce Law" (1998), 56 *U.T. Fac. L.*

Rev. 135, at pp. 139 and 156). I find the comments of Shaffer and Rogerson at p. 71, pertinent in this respect:

> The continuing prevalence of waivers and time-limits in spousal support agreements, even in "core" spousal support cases involving marriages of significant duration with children, suggests that there may be something in the structure of bargaining around spousal support that allows the obligation to be whittled down. It also suggests that there are serious concerns about how free and fully informed some of the contractual choices about bringing finality to the spousal support obligation really are, thus undermining arguments in favour of contractual freedom and autonomy. [Emphasis added.]

214 Comments such as these underscore the importance of recognizing the degree to which social and economic factors may constrain individuals' choices at the bargaining table (see Neave, *supra*, at p. 122). The inequalities in bargaining power at play in the settlement process are not gender neutral. As this Court stressed in *Moge* at p. 850, in many (if not most) marriages, the wife remains the economically disadvantaged partner. Though marriage relationships are, in general, becoming more egalitarian, there continues to be a disjunction between the principle of equality and the lived economic and personal reality of many married women, and the law needs to be able to recognize and to accommodate the situations where this disjunction exists.

215 We should also recognize that it is typically women who come to the bargaining table as the financially dependent spouse, and hence the more vulnerable party in the negotiating process. Where this is the case, their freedom to negotiate may be significantly constrained by pressure to reach a timely settlement in light of financial need and other stresses, such as the inability to marshal other sources of support during the negotiations, and the fear of losing custody of, or access to, the children. See Bailey, *supra*, at p. 616; Neave, *supra*, at pp. 117 and 125-26; Stotland and Siminovitch, *supra*, at pp. 165-66 and 168; Martin, *supra*, at pp. 146-48.

216 The unconscionability test is blind to these and other subtle ways in which the economic disparities between the parties and the parties' respective familial roles, both of which continue to be gender-based, may play into the negotiating process and significantly influence its outcome. The test that governs judicial intervention in spousal support agreements must be one that is responsive to these realities.

217 The new test must also be sensitive to the unique nature of the agreements the parties are negotiating. Unconscionability, as a retrospective doctrine which is concerned solely with the moment of contract formation, is inadequate to do so, even in the revised form suggested by Wilson J. in *Leopold* (see Bala and Chapman, *supra*, at pp. 1-9 and 1-35; Shaffer and Rogerson, *supra*, at p. 94). Separation

agreements may "require individuals to make predictions about every aspect of their future lives" and, as Bala and Chapman note, such prospective assessments are "inherently speculative" (p. 1-3); see also Shaffer and Rogerson, *supra*, at pp. 68-69. Their accuracy may be undermined by the emotional overlay that characterizes marital breakdown and by the gendered disparities in bargaining power that I described above. Even where this is not the case, it may nonetheless be difficult for the parties to assess how the economic consequences of the marriage and its breakdown will unfold over time. Shaffer and Rogerson suggest, for instance, that parties "routinely underestimate the time it will take a formerly dependent spouse to overcome the economic disadvantages of the marriage and become self-sufficient" (p. 68). The law should be able to take into account the fact that, for a myriad of reasons, parties at the time of separation may not have the clear-sighted ability to project their circumstances into the future, and may thus negotiate agreements that will not in fact equitably distribute the economic consequences of the marriage and its breakdown as they play out over time.

218 Given these realities, the private contractual model — and similarly any model based on the assumptions that underlie it — has limited value in the spousal support context. Even where an agreement is not strictly speaking unconscionable, it may nonetheless be inappropriate for the court to uphold it. While it is important to respect the will of the parties, courts cannot assume that the parties' spousal support agreements necessarily provide a clear and transparent guide to their intentions, which, as in any area of the law, are often difficult to ascertain. In the family law context, the parties' "freedom" to contract may be significantly constrained by social and economic factors, and may be decidedly unequal. An agreement may be a product of many implicit, as well as explicit, compromises. It may reflect fundamentally flawed assumptions about how the consequences of the marriage and its breakdown will affect the parties' post-divorce lives. In light of these factors, I question the desirability of a policy of excessive deference that puts the courts in the position of enforcing support agreements because they are presumed to represent the objective expression of the parties' free will. While representation by competent counsel is advisable, even necessary, in this context and while professional advisors should certainly seek a proper settlement and most do, the presence of counsel will not always be sufficient to redress these problems.

C. *Did the Court of Appeal Err in Applying a Change-Based Test?*

219 If the trilogy test is no longer good law, and contract principles are insufficient to deal with the inequities that may flow from family law dynamics, the question then becomes what threshold test should govern the exercise of judicial discretion under s. 15.2 of the 1985 Act to modify the support provisions of a separation agreement or to enter a new support order in the face of an existing agreement. Abella J.A., in her reading of what she termed the *Divorce Act*'s "linguistic tea leaves", held that the threshold for varying a subsisting support agreement in an application for corollary relief under s. 15.2 is whether there has been a material change in the parties' circumstances since the agreement was made. Only where this threshold is met, is the agreement itself evaluated with reference to the objectives in s. 15.2(6) of the 1985 Act.

220 I agree with the majority that Abella J.A. was in error in establishing a change-based threshold under s. 15.2. I think it important to emphasize, however, that my reasons for so holding go

beyond the inconsistency between a change-based threshold and the language of s. 15.2(4) itself. The imposition of a change-based threshold gives rise to broader difficulties in attempting to meet the objectives in s. 15.2(6) in a way that is appropriately attentive to the unique aspects of spousal support agreements.

221 Abella J.A. begins her analysis with the recognition that, based on the language in the 1985 Act and this Court's contemporary, more contextual approach to spousal support, the trilogy's strict threshold test for judicial intervention in support agreements no longer applies. While I agree with her characterization of the support provisions of the 1985 Act as a whole, as well as her analysis of the recent trends in this Court's jurisprudence, I find inherently problematic Abella J.A.'s more narrowly focussed statutory analysis of both s. 15.2(4)(*c*) and the relationship between ss. 15 and 17 of the 1985 Act. In Abella J.A.'s view, the fact that orders and agreements are referred to together in s. 15.2(4)(*c*), while not determinative, may be interpreted as a signal of Parliament's intent that they be similarly treated. She thus reasoned that the standard for overriding the terms of a support agreement in an originating application under s. 15.2 should parallel the standard for varying a support order under s. 17 (4) and adopted the change-based threshold test codified in s. 17 as the relevant threshold under s. 15.

222 In her attempt to root a change-based threshold under s. 15 in the provisions of the 1985 Act itself, Abella J.A. read into s. 15.2 something that is simply not there. The change threshold that she endorsed, and indeed any change-based threshold, accords a degree of finality to agreements that is inconsistent with the structure of s. 15.2(4) of the 1985 Act itself, which conceives of agreements as but one of the relevant factors for the court to consider in an application for corollary relief. The court's review of the relevant factors enumerated in s. 15.2(4) in relation to the objectives in s. 15.2(6) is not statutorily constrained by any explicit threshold test, as it is in s. 17. These aspects of s. 15.2 lend no support to the conclusion that Abella J.A. reached.

223 Even if the language and structure of s. 15.2 did not preclude the imposition of the material change-based threshold that Abella J.A. espoused, I would nonetheless reject any importation of this change-based test into s. 15.2. While the threshold proposed by Abella J.A. provides a level of assurance that the parties' arrangement will be upheld — in so far as an agreement can never be overridden where the required degree of change has not occurred — this degree of certainty comes at the expense of fairness, which may be considered only at the second stage of the analysis (see Shaffer and Rogerson, *supra*, at pp. 75-76 and 86).

224 Under Abella J.A.'s test, if no material change has occurred, even patently unfair agreements cannot be reviewed or varied by the courts. As Bala and Chapman, *supra*, note at p. 1-37, the inevitable result of requiring an applicant to satisfy a material change threshold for judicial review is that, in some cases, those who should be entitled to a review will be denied access to the courts (see also *Champagne v. Champagne*, [2001] O.J. No. 2660 (QL) (S.C.J.)). This outcome is inconsistent with the objectives of spousal support codified in s. 15.2 of the 1985 Act, as well as with broader notions of

equity, equality and justice.

225 The likely result of a change-based threshold, as Ms. Miglin submitted, is that courts will manipulate the meaning of "change" to "deal with what are, essentially, fairness concerns". I agree with Shaffer and Rogerson that such manipulation is far less desirable than having courts directly and explicitly confront what constitutes a fair agreement at the initial stage of the analysis (pp. 83, 86 and 100-101). The risk that courts will be forced to manipulate what constitutes "change" will remain a problem under the majority's framework, which in effect requires a very substantial change before a court may intervene at the time of the s. 15.2 application if the agreement in question was not vitiated by a "fundamental flaw in the negotiation process" and appeared to have been be in "substantial compliance" with the Act at the time it was executed. As I outlined above, family law experts stress that parties may not be able to adequately foresee all of the economic consequences of a marriage or its breakdown at the time they negotiate an agreement; over time, it may become clear that what seemed fair (or at least substantially compliant) at the outset, was not in fact so, even where there is no evidence of a material change in the circumstances of the parties. Though the majority uses the language of foreseeability, they interpret narrowly the range of circumstances that fall outside of the foreseeable. The result in some instances may be to prevent courts from redressing unfairness flowing from the parties' inability to accurately predict the long-term consequences of their marriage and its breakdown at the time they entered into their separation agreement.

226 I thus agree with Ms. Miglin's submission that a change-based threshold "imposes an artificial and unwarranted burden on a support claimant who is faced with an unfair agreement", and would add that this is so whether the change requirement serves as an initial threshold for judicial intervention (Court of Appeal) or plays a very significant role in whether the court intervenes in an agreement that appeared to have been in substantial compliance with the objectives of the 1985 Act at the time it was signed (majority). A change-based threshold must thus be rejected in favour of a fairness-based threshold in applications for corollary relief under s. 15.2. It is to a consideration of what fairness entails in this context that I now turn.

D. *The Proper Approach to Applications Under Section 15.2*

227 The appropriate threshold for overriding a support agreement in an application for corollary relief under s. 15.2 is whether the agreement is objectively fair at the time of the application. This test is based on the language of the statute, which gives the court a broad jurisdiction and a duty to ensure that matrimonial agreements prove to be consistent with the objectives of the law. It is also grounded in sound policy reasons which reflect the context in which these agreements are made and the complexities of the breakup of the marriage as they evolve in the parties' lives over time. It is in effect the approach endorsed by Shaffer and Rogerson, after a comprehensive review of the available alternatives, in their article "Contracting Spousal Support: Thinking Through *Miglin*", *supra*.

228 This threshold allows the reviewing court to intervene regardless of whether the unfairness at the time of the application stems from the unfairness of the initial agreement, the parties' failure at the time the agreement was negotiated to accurately predict how the economic consequences of the marriage or its breakdown would play out over time, or changes in the parties' circumstances (Shaffer and Rogerson, at p. 87). It places the emphasis on whether the support agreement has in fact brought about an equitable distribution of the economic consequences of the marriage and its breakdown, the ultimate goal of spousal support embodied in the statute and affirmed by this Court. In contrast, the majority's two-part test creates an artificial distinction between an assessment of the agreement at the time it was signed and an assessment of the agreement at the time of the application. Where an agreement is not voidable for reasons relating to the circumstances of execution and is found to be in substantial compliance with the Act at the first stage, it will be subject to a very stringent test for variation at the second stage. As I noted above, this approach is inadequate to deal with the problems that family law experts identify flowing from the inherently prospective nature of spousal support agreements. Its effect is to penalize parties who do not accurately predict the future by subjecting agreements that may have appeared fair at the outset, but that result in unfair circumstances, to a stricter standard for judicial intervention. In addition, the majority's approach fails to accord appropriate weight to a consideration of whether the agreement is in fact meeting the objectives in s. 15.2(6) at the time of the application. In my view, a single standard is preferable. Courts should not be in the business of enforcing unfair agreements irrespective of whether the unfairness is inherent in the provisions of the initial agreement or manifests itself only as the economic consequences of the marriage and its breakdown play out in the parties' lives over time.

229 In my estimation, the content of fairness in this context is dictated by the 1985 Act itself. Parliament has spoken clearly on this issue by establishing legislative norms for spousal support in s. 15.2. A fair agreement is one that reasonably realizes the objectives codified in s. 15.2(6), the overarching purpose of which is the equitable distribution of the economic consequences of the marriage and its breakdown. I agree with the approach that L'Heureux-Dubé J. took to separation agreements in her minority decision in *G. (L.) v. B. (G.)*, *supra*, which involved an application for variation to a consent support order arising out of an antecedent agreement between the parties, pursuant to s. 17 of the 1985 Act. The principle that L'Heureux-Dubé J. established in there is equally applicable to applications for corollary relief under s. 15.2: the more a spousal support agreement takes into account the objectives codified in s. 15.2(6), the more likely it will be to influence the outcome of the application (para. 56). However, I would add to L'Heureux-Dubé J.'s analysis the caveat that there may well be cases, though they are likely to be in the minority, where the spousal support agreement at the time of formation does attempt to take into account the objectives of s. 15.2(6), but it nonetheless results in circumstances that are inconsistent with those objectives. In these situations, as well as in cases where the agreement's unfairness stems from the parties' failure to address adequately the objectives in s. 15.2 (6) at the point of settlement, it is appropriate and, indeed, necessary for the court to override the spousal support provisions.

230 An approach that evaluates the extent to which an agreement realizes the Act's objectives for spousal support, and bases its degree of deference to the agreement on the agreement's degree of compliance, is mandated by the structure of s. 15.2 as a whole, which requires that the factors in s. 15.2

(4), including any agreement, be assessed in light of the objectives in s. 15.2(6). Because this approach places the emphasis on an objective evaluation of the content of the agreement and the circumstances of the parties at the time of the application, it is also appropriately responsive to the unique nature of family law agreements, which for the reasons I outlined above may not always provide a transparent guide to the parties' intentions. And, finally, this approach reflects what Parliament has determined to be the driving consideration in support awards: achieving an equitable disentangling of the parties' economic relationship upon marital breakdown. It is inappropriate to allow parties, by way of private agreements, to subvert this statutory policy (see McLeod, Annotation to *B. (G). v. G. (L.)*, *supra*, at p. 218), and to require courts to sanction this subversion by mandating deference to unfair agreements.

231 The process of determining whether an agreement is fair will of necessity be fact and context specific. The issue is whether, in light of all of the parties' circumstances at the time of the application, the agreement adequately meets the spousal support objectives in s. 15.2(6). This will require trial judges to make case-by-case determinations based on the whole picture of the parties' relationship, including their respective functions during the marriage, their allocation of capital and income upon the breakup, their childcare responsibilities, their employment prospects, and a range of other factors. Because parties may attempt to achieve economic equity in a variety of ways (i.e., through property division and spousal support), the entirety of the parties' financial arrangement upon marital dissolution and not merely the spousal support provisions in their agreement must be considered. This is precisely the kind of comprehensive inquiry called for under s. 15.2. The inquiry must consider all aspects of the parties' relationship, addressing pure need as well as compensation.

232 Any attempt to apply the objectives in s. 15.2(6) in a particular case will involve judgment calls, accommodation, and interpretation. The parties' own attempts to achieve the objectives codified in s. 15.2(6) in the context of their unique situation should not lightly be disregarded. Whether, however, an agreement reasonably satisfies the objectives of spousal support does not depend entirely on the subjective expectations of the parties. Rather, it involves an objective assessment of both the content of the agreement and the circumstances of the parties at the time of the application. To be given substantial weight, the parties' agreement, objectively assessed, must indicate a genuine attempt to achieve the objectives in s. 15.2(6), and must fall within the parameters of "the generous ambit within which reasonable disagreement is possible" in terms of actually achieving them. See Shaffer and Rogerson, *supra*, at pp. 94-95; McLeod, Annotation to *B. (G). v. G. (L.)*, *supra*, at p. 220.

233 I agree with L'Heureux-Dubé J.'s suggestion in *G. (L.) v. B. (G.)*, that "[i]n drafting future agreements, counsel would be well advised to articulate the bases on which both spousal and child support covenants have been negotiated" and to mention more particularly "the various factors and objectives they took into account in their agreement to share the economic consequences of the marriage and its breakdown" (paras. 56-57). Reviewing courts are not required, however, to take the parties' characterizations of their situation at face value. A disclaimer such as that at para. 10(d) of the Miglins' Separation Agreement — "[t]he parties specifically agree and acknowledge that there is no causal connection between the present or any future economic need of either party and their marriage" — will not satisfy L'Heureux-Dubé J.'s admonition in letter or in spirit. Nor will statements such as that in para. 10(d) of the Miglins' Separation Agreement — "[n]o pattern of economic dependency has been

established in their marriage" — where, as here, such statements are quite clearly belied by the facts. The parties do not alter the reality of their situation by simply proclaiming economic equality in their Agreement. In order for a court to lend substantial weight to an agreement, in addition to taking account of the parties' evident desire for finality, the agreement must do more than simply speak the language of equality. As emphasized in *Moge*, at p. 864, in a passage that bears repeating in this context:

> The doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown upon its dissolution which, in my view, the Act promotes, seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse. Significantly, it recognizes that work within the home has undeniable value and transforms the notion of equality from the rhetorical status to which it was relegated under a deemed self-sufficiency model, to a substantive imperative. [Emphasis added.]

For an agreement to merit deference in an application for corollary relief under s. 15.2, it must recognize the parties' lived reality and must genuinely attempt in light of this reality to equitably apportion the economic consequences flowing from the marriage and its breakdown.

234 Even where an agreement represents a genuine attempt to address the objectives in s. 15.2 (6), if, by the time of the application, it falls outside of the parameters of the generous ambit within which reasonable disagreement is possible in terms of actually achieving them, the court must intervene. In other words, it is not enough that an agreement is intended to effect an equitable sharing of the economic consequences of the marriage and its breakdown; it must in fact reasonably accomplish this end. If the parties' circumstances evolve in ways they do not anticipate when they enter into the agreement, even an agreement that envisioned meeting the objectives in s. 15.2(6) at the time it was negotiated may no longer serve those objectives at the time of the application. Fairness requires that in such cases the court override the agreement's spousal support provisions in favour of an order that does in fact realize the objectives of the 1985 Act.

235 The role of the reviewing court is not, however, to engage in tinkering with or "fine-tun [ing]" agreements (see McLeod, Annotation to *B. (G). v. G. (L.)*, *supra*, at p. 220). It is important to stress that, in order to be respected as an authoritative guide to the parties' actual intentions and expectations and to be endorsed by a court faced with a s. 15.2 application, an agreement need not correspond perfectly in its terms or in its results with the objectives of the 1985 Act. Provided that at the time of the application the arrangement falls within the generous ambit within which reasonable disagreement is possible in terms of realizing the objectives in s. 15.2(6), it will be enforced. This approach does not deny individuals the autonomy to organize their lives as they see fit or prevent them from bringing their own concerns, desires and objectives to the negotiating table as the majority suggests. Instead, it accords parties a considerable degree of flexibility in negotiating arrangements that reflect their particular priorities. At the same time, it recognizes that under the legislative framework there are, as broader principles of fairness dictate there should be, certain non-negotiables. Where, for

instance, an agreement, either on its face or in its result, fails to address the dependent spouse's proven need arising from the breakdown of the marriage, it is appropriate for the court to intervene on the ground that the agreement is inconsistent with the objectives in s. 15.2(6), even if the agreement achieves some of the parties' other goals in reaching a settlement.

236 An approach that requires that agreements realize the objective of equitably distributing the economic consequences of the marriage and its breakdown is not only compelled by the 1985 Act, it is also consistent with society's notions of what is fair and just in the circumstances of marital dissolution. Though made in a different context, this Court's comments in *Bracklow*, *supra*, at para. 48, are of relevance in this respect:

> To permit the award of support to a spouse disabled by illness is but to acknowledge the goal of equitably dealing with the economic consequences of marital breakdown that this Court in *Moge*, *supra*, recognized as lying at the heart of the *Divorce Act*. It also may well accord, in my belief, with society's sense of what is just. [Emphasis added.]

Marriages are complex relationships of trust and interdependence, in which people develop expectations and reliance that must be recognized. They are not commercial, arm's length transactions. The factors that shape the needs and expectations flowing from a particular marriage are numerous, and will include among others the length of the marriage and the functions the spouses performed during the course of the relationship. Upon marriage breakdown, the former spouses may come to some agreement relating to the support of either of them. Ideally, such an agreement will represent a genuine attempt by the parties to respond to the needs and expectations created by the marriage and its breakdown, and to recognize the effect that the dissolution of the relationship will have on the family unit as a whole, including any children of the marriage.

237 However, an agreement may respond only partially to the needs and expectations created by the marriage and its breakdown. Its existence does not allow courts to ignore the entirety of the parties' circumstances. To do so would not only be contrary to the 1985 Act but, in my view, to society's understanding of what is fair. Fairness requires that the parties' lived reality and the economic consequences that flow from it are addressed in the arrangement that governs their post-divorce relationship. It requires a court to consider all of the parties' needs and legitimate expectations and not only those recognized in an agreement. Where an agreement does not accord adequate weight to the actual economic dependencies flowing from the relationship or address the actual needs of the parties arising from the marital breakdown as those needs emerge in post-divorce life, in my view it is unjust and should not be upheld.

238 I must take issue with Mr. Miglin's argument, reflected in the majority's reasons, that

focussing on the degree to which the terms of a support agreement realize the objectives set out in s. 15.2(6) is inconsistent with one of the broader policy goals of the 1985 Act, found in s. 9(2), the promotion of settlement. Section 9(2) requires lawyers acting on behalf of a party to a divorce proceeding to discuss the possibility of a negotiated settlement with their client and to inform their client of any mediation facilities of which they are aware. This provision reflects a broader ethical duty that binds lawyers in the conduct of all litigation as members of the Bar and officers of the court (see, for example, Rules 2.02(2) and 2.02(3) of the *Rules of Professional Conduct* of the Law Society of Upper Canada). However, while as s. 9(2) recognizes, settlement is clearly to be encouraged, I do not think that the 1985 Act may properly be understood to privilege settlement *per se*. A general provision such as s. 9(2) cannot be read independently from the very specific legislative objectives for spousal support outlined in s. 15.2(6). Parties, while encouraged by s. 9(2) to settle their affairs privately, are not permitted to contract out of the Act. The 1985 Act requires courts to make spousal support orders that aim as much as possible to comply with the objectives codified in s. 15.2(6). Given this statutory framework, what the 1985 Act may be said to encourage is not settlement in itself but rather settlements that accord with the legislative objectives for spousal support articulated in s. 15.2(6). To conclude otherwise is to fail to conceive of the 1985 Act as an integrated whole. It is also potentially to put courts in the position of enforcing unfair agreements that contradict the objectives of the very Act that empowers them to hear support applications in the first place.

239 In the spousal support context, then, the legislated policy goal is not negotiated settlement but rather the negotiation of fair settlements, with fairness evaluated according to the objectives of the 1985 Act (see also the comments of Shaffer and Rogerson, *supra*, at pp. 80-81 in this respect). The requirement that an agreement be objectively fair at the time of the s. 15.2 application will not discourage parties from negotiating settlements, as the majority suggests. The fraction of divorces currently litigated is very small, perhaps even less than 5 percent (see Martin, *supra*, at p. 137; Payne and Payne, *Dealing with Family Law: A Canadian Guide*, *supra*, at p. 82). This reflects the significant benefits that negotiated settlements offer parties at marital breakdown. As Bala and Chapman, *supra*, outline at p. 1-41:

> Entering into a separation agreement avoids the financial and psychological costs of litigation, and provides for a more expeditious and less uncertain resolution of a dispute between spouses than taking their case before a judge for decision. Furthermore, a separation agreement is more likely to reflect the parties' expectations and preferences than an agreement imposed by a judge.

An objective fairness threshold for judicial intervention in spousal support agreements will not lessen parties' interest in avoiding the financial and psychological stress of litigation or in resolving their dispute expeditiously. It will allow parties to retain considerable freedom to draft an agreement that both realizes the objectives in s. 15.2(6) and reflects their own expectations and preferences in a way a court-imposed order might not. Given these advantages, parties on marital dissolution will by and large continue to resolve their post-divorce affairs by private agreement. See Bala and Chapman, *supra*, at pp. 1-4 and 1-41.

240 I also agree with Bala and Chapman that the "vast majority of ex-spouses will *not* seek variation and the vast majority of people will honour their agreements" as the "psychological and financial costs of reopening an agreement will remain high" (p. 1-41 (emphasis in original)). These conclusions are supported by the fact that parties typically enter into and abide by agreements with regard to child support, and custody and access, despite the fact that courts enjoy a broad discretion to override the provisions of such agreements. They are also borne out by the lack of empirical evidence that a fairness threshold for judicial intervention in agreements with regard to matrimonial property division has discouraged settlement or increased litigation in British Columbia (s. 65(1) of the *Family Relations Act*, R.S.B.C. 1996, c. 128, empowers courts to override an agreement for the division of matrimonial property where it is "unfair"). See McLeod, Annotation to *B. (G.) v. G. (L.)*, *supra*, at p. 219; Bala and Chapman, *supra*, at pp. 1-41 and 1-42; Shaffer and Rogerson, *supra*, at pp. 60-61.

241 Rather than discouraging settlement, in my view a threshold for judicial intervention that involves an assessment of whether an agreement is objectively fair at the time of the application will encourage parties to negotiate fair settlements (see Bala, *supra*, at p. 61; Bala and Chapman, *supra*, at p. 1-43). In the process, it will foster the genuine autonomy and dignity of both spouses. The awareness that reviewing courts will evaluate agreements in terms of the degree to which they realize the objectives in s. 15.2(6) should lead parties to prioritize reaching an equitable distribution of the economic consequences of the marriage and its breakdown. To this end, as I indicated above, parties will need to do more in an agreement than merely parrot the objectives of the 1985 Act, or the language of this Court's jurisprudence stripped of its context. The inquiry into whether an agreement is objectively fair at the time of the application is not a formalistic one, about whether the terms of the agreement appear to be in technical compliance with the Act. Rather, this inquiry involves a probing, contextual analysis of the content of the agreement and the circumstances of the parties at the time of the application in order to determine whether the substantive effect of the agreement is an equitable distribution of the economic consequences of the marriage and its breakdown.

242 In my view, it is not in line with the tenor of this Court's jurisprudence on spousal support to hold that an agreement is in "substantial compliance" with the objectives of the 1985 Act where it in fact deviates substantially from the goal of economic equity embodied in those very objectives. The threshold proposed by the majority may require only that settlements that represent a very significant departure from the spousal support objectives of the 1985 Act not receive judicial approbation. This sets the bar much too low. The goal in the family law context should be for parties to strive towards the most fair agreement they can, rather than merely for courts to set aside unconscionable or grossly unfair settlements. Judicial interpretation of the *Divorce Act* should not permit parties simply to avoid formal injustice when entering into separation agreements. The express wording of the 1985 Act and judicial developments since *Pelech* mandate that such agreements aspire to, and in fact achieve, substantive justice. Fairness requires nothing less.

E. *Application to the Facts*

243 In the circumstances of this appeal, it is not appropriate to defer to the spousal support waiver in the parties' Separation Agreement. Both the trial judge (applying in essence a fairness test) and the Court of Appeal (after finding that the material change threshold that I rejected above had been met) found that the Miglins' division of assets and maintenance arrangements for Ms. Miglin failed to meet the objectives in s. 15.2(6). I agree with this conclusion, although I think it important to clarify why, considered as a whole, the parties' financial arrangements were insufficient to fall within the generous ambit within which reasonable disagreement is possible in terms of realizing the spousal support objectives in s. 15.2(6). I also think it important to stress at the outset that, while it may be easy to be diverted by considerations of Ms. Miglin's absolute worth, the proper inquiry is a relative one that asks whether the parties' financial arrangements in fact equitably distribute between them the economic consequences of their marriage and its breakdown.

244 Before turning to the content of the parties' Separation and Consulting Agreements, I will briefly address the majority's conclusion that there was nothing about the circumstances surrounding the negotiation process and the execution of the parties' Agreements in this case sufficient to bring into question their validity. I note that it was Ms. Miglin's testimony at trial that she was not content with the Separation Agreement and that she felt pressured by Mr. Miglin to agree to the waiver of spousal support. In her words, "it was a very confusing and emotional time". Given that the trial judge did not make factual findings on this issue, and that it was not Ms. Miglin's contention in her pleadings before this Court that these factors vitiated the parties' Agreements, I do not intend to draw any conclusions about the environment in which the parties' Agreements were negotiated. Nonetheless, I would caution against dismissing out-of-hand concerns about the effects of the emotional upheaval and the pressures to which Ms. Miglin testified on the negotiating process. It may be extremely difficult to assess and to quantify the subtle ways in which the parties' emotional vulnerabilities and the power imbalances between them may affect the formation of a separation agreement, even where, as here, the parties have negotiated over a period of time with the advice of independent counsel. Given these difficulties, in my view, the most appropriate way to be responsive to the unique negotiating context for separation agreements is to focus on an objective assessment of the results of the parties' negotiating efforts. As I outlined above, this involves an evaluation of the content of the agreement, together with the circumstances of the parties at the time of the application, in order to determine whether the Agreement in fact falls within the generous ambit within which reasonable disagreement is possible in terms of realizing the objectives in s. 15.2(6).

245 Turning to the content of the Separation and Consulting Agreements, it is clear that the Agreements failed to realize reasonably the objectives of s. 15.2(6) at the time they were negotiated and that this continued to be the case at the time of Ms. Miglin's application for corollary relief. The Separation Agreement provided that Ms. Miglin convey her one-half interest in the parties' business to Mr. Miglin in exchange for his one-half interest in the matrimonial home and his assumption of the mortgage. Ms. Miglin's disposition of the business (a "consequence of marriage breakdown" under s. 15.2(6)) resulted in significant disadvantages to her. While the parties' half-interests in each of the business and the matrimonial home were valued at approximately $250,000, it is, as the trial judge observed, difficult to see the exchange as an equal split given that Ms. Miglin exchanged an income

producing asset (which was grossing close to $1.5 million per annum at the time of trial) for a non-income producing asset. Moreover, it is important to emphasize that as a consequence of the breakdown of the marriage, Ms. Miglin not only gave up her rights to any ongoing benefits from the parties' business — the success of which, as the trial judge held, she was equally responsible for — she also lost her employment income of $80,500 per annum. The parties recognized that, as a result, Ms. Miglin would need an income stream — the very existence of the Consulting Agreement testifies to this — and also, given the Consulting Agreement's open-ended renewal clause, that her need might continue beyond the Agreement's initial five-year term. That Ms. Miglin never did much work under the Consulting Agreement underscores the fact that its primary purpose was to provide a source of income for her, as reflected in the trial judge's finding that the Agreement constituted "thinly veiled spousal support" (para. 15). The Consulting Agreement, however, provided Ms. Miglin with but $15,000 in income per annum (plus a cost of living index), an amount insufficient to address the significant financial deficit created by the loss of her position with the Lodge.

246 The resulting inequity was compounded when Mr. Miglin failed to renew the Consulting Agreement. The discontinuation of the Consulting Agreement coincided with a deterioration in the parties' post-divorce relationship that the trial judge attributed to Mr. Miglin's decreasing control over his former spouse. Ms. Miglin testified at the trial that it had been her expectation that the Consulting Agreement would be renewed. The majority, however, points to evidence that Ms. Miglin was aware that the Consulting Agreement might not be renewed, noting that she had been advised by her accountant to plan ahead for a potential drop in her income. In my view, the critical point is that, regardless of Ms. Miglin's expectations in this regard, a clear objective of the 1985 Act is to ensure that where a dependent spouse has financial needs arising from the breakdown of the marriage, these needs are adequately redressed by spousal support, provided the other spouse has the ability to pay, as is the case here. Ms. Miglin, by losing her share in the parties' successful business and her employment, disproportionately suffered the economic disadvantages of marriage breakdown. The parties' financial arrangements, in not providing spousal support and in providing only a small income to Ms. Miglin which could be, and was, terminated after five years, did not compensate for or share these disadvantages. Clearly, then, the objectives of s. 15.2(6) were not met.

247 In addition to the disproportionate economic disadvantages arising from the breakdown of the marriage, Ms. Miglin suffered disproportionate economic disadvantages arising from the roles that the parties adopted during their 14-year marriage, both in their business relationship and in their domestic lives. The proclamation in the Separation Agreement that "[n]o pattern of economic dependency has been established in their marriage" is belied by the reality of the parties' circumstances both during and after their marriage.

248 Turning first to the business aspect of the parties' relationship, it is important to recognize that while the parties' contributions to the success of the Lodge — a success from which Ms. Miglin no longer benefits — were of equal value, they were nonetheless different in kind. Mr. Miglin was responsible for the overall management of the business, including all of the budgeting and long-range planning for the Lodge. Ms. Miglin was responsible for administrative and housekeeping tasks. She was sheltered in her role in the business from exposure to the workings of the market, and remained dependent throughout on Mr. Miglin's business acumen and financial decision-making. As she testified

at trial: "I don't think I could've done it without him. He could do it without me."

249 When her marriage failed and she was forced to leave her job at the Lodge, Ms. Miglin was thus more vulnerable economically than she would have been had she worked outside of the family-owned and operated business for an equivalent period of time. Because her employment since 1984 had been exclusively with the Lodge, with which she was no longer connected after the separation except in a nominal consulting capacity, she did not leave the marriage with any of the advantages that typically would have flowed from long-term employment outside of the family business, such as seniority or job security.

250 Mr. and Ms. Miglin divided their responsibilities for the Lodge in much the same way that they divided the household responsibilities, with Ms. Miglin playing a role that was crucial, but that was less economically valued in the marketplace. As a result, Ms. Miglin's responsibilities at the Lodge did not leave her with the skills and experience of a manager in the hospitality industry. It is unrealistic to expect that she will be able simply to step into a position offering her a salary close to that which she received from the Lodge. Rather, the limited opportunities that Ms. Miglin had to develop marketable skills in the family business — her only source of employment since 1978 — will have a long-term impact on her prospects for self-sufficiency, a fact that was not recognized in the parties' allocation to Ms. Miglin of an income stream of but $15,000 and the termination of even this modest income after five years.

251 In terms of the parties' organization of their domestic lives, Ms. Miglin was the children's primary caregiver throughout the marriage, and she continues to be the primary caregiver of three of the parties' four children. During the marriage, Ms. Miglin's work responsibilities (and thus her opportunities to garner skills and experience) were circumscribed by her childcare responsibilities. Once the eldest child was in school, for instance, Ms. Miglin commuted from Toronto to Algonquin Park during the four shoulder months (May, June, September and October) when the Lodge was open, but school was in session, rather than working full-time as Mr. Miglin did. Ms. Miglin's post-separation day-to-day childcare responsibilities will continue to have significant and long-term economic consequences for her, limiting both her opportunities for employment and her future earning capacity and thus impairing her capacity to become economically self-sufficient. The parties' financial arrangements failed to recognize this reality by providing Ms. Miglin with only a small amount of income over a short period of time. Moreover, the structure of the parties' agreements afforded Mr. Miglin the discretion to terminate even this limited income stream after five years, despite the fact that Ms. Miglin was experiencing ongoing need arising in part from the childcare responsibilities that the parties agreed she would assume both during and after the marriage.

252 The majority suggests (at para. 95), based on correspondence between the parties' counsel during the negotiation of the separation agreement, that it was Ms. Miglin's preference to release Mr. Miglin from spousal support on the "condition that her economic needs were addressed through child

support", in other words, on the condition that she received sufficient child support payments to cover her own expenses and meet her own economic needs as well as those of the children. Even if this was indeed her preference, the financial arrangements between the parties did not in fact adequately address the economic needs of Ms. Miglin, in part because they failed to equitably acknowledge the long-term financial consequences of her childcare responsibilities. In other words, the parties' financial arrangements were not appropriately attentive to the objective in s. 15.2(6)(*b*), of apportioning between the spouses the financial consequences arising from the care of the parties' children over and above any obligation for the support of the children of the marriage.

253 For the reasons that I have identified, the parties' financial arrangements manifestly failed to address the fact that Ms. Miglin disproportionately suffered economic disadvantages flowing both from the roles that the parties adopted during their 14-year marriage (and in terms of childcare, after the marriage as well) and from the breakdown of the marriage. This was not a situation in which the parties' financial arrangements upon separation provided for an income stream for the dependent spouse that, although somewhat lower than what a court might have awarded, was nonetheless reasonable in the circumstances. The Separation Agreement provided no spousal support or income stream whatsoever to Ms. Miglin, while the Consulting Agreement allowed for only $15,000 annually, which Mr. Miglin terminated after five years despite Ms. Miglin's ongoing need. While the majority suggests that Ms. Miglin's net worth has increased since the parties' separation, the reality is that Ms. Miglin will have no income stream, other than the support that she receives for her children, for the foreseeable future unless she sells her home or divests herself of her RRSPs, which she requires for her future security.

254 Considered as a whole, then, the parties' financial arrangements were insufficient to fall within the generous ambit within which reasonable disagreement is possible in terms of realizing the spousal support objectives in s. 15.2(6) at the time of Ms. Miglin's application. It was thus appropriate for the trial judge to intervene and award her corollary relief. As the question of quantum of support was not pleaded before this Court, I assume without deciding that the amount awarded by the trial judge, and upheld by the Court of Appeal, was appropriate.

255 I agree with the Court of Appeal's decision to set aside the trial judge's order imposing a five-year term on spousal support. While Ms. Miglin has a responsibility, under s. 15.2(6)(*d*), to take steps towards achieving self-sufficiency, the Court must be careful to understand this responsibility in its proper context, particularly in light of the fact that Ms. Miglin is raising young children and that this is in fact full-time work for her. Mr. Miglin did not oppose Ms. Miglin's decision to stay at home with the children. As the trial judge noted, he was "fully aware at the time of negotiating the separation agreement that his wife would be involved in full time care of his four children, and that there was little likelihood that she could become economically self-supporting until the children matured" (para. 32). Given the ages of the parties' children and Ms. Miglin's responsibilities to them, I share Abella J.A.'s view that the five-year time limit was "unhelpfully speculative". The situation here is not, however, a static one. Ms. Miglin must be alive to the fact that she has an ongoing obligation to make herself self-sufficient, in so far as is practicable. As Ms. Miglin's children grow older, her responsibility for finding employment may well increase, and the court retains the jurisdiction to intervene if, at some later date, it becomes clear that Ms. Miglin is not making a serious effort to move towards self-sufficiency.

V. Disposition

256 I would dismiss the appeal and affirm the order of the Ontario Court of Appeal. Ms. Miglin will have her costs throughout.

Appeal allowed, LEBEL *and* DESCHAMPS JJ. *dissenting.*

Solicitors for the appellant: Nicole Tellier, Toronto; Watson Jordan, Toronto.

Solicitors for the respondent: Epstein Cole LLP, Toronto.